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THE TESTIMONY OF MEDICAL EXPERTS, AND THE READING OF MEDICAL BOOKS IN JURY TRIALS.

The admissibility of the evidence of experts in courts of justice, has long been settled, but there is still some discrepancy as to the conditions of its admission, sufficiently important to deserve a most careful consideration.

Of late years, cases have become more and more frequent, in which such evidence has been admitted touching the mental condition of one of the parties; and the expert is even allowed to form his opinion, solely, perhaps, on the statements of other witnesses, without any personal examination of the party himself. Counsel, it is true, often endeavor to discredit such evidence, by calling it theoretical and speculative, but if they really believe what they say, they only show a great misapprehension of the nature of the question. The mental condition of a person is manifested by his conduct and conversation, by his acts, his opinions, his manners and deportment, all which are matter of observation, and may come within the cognizance of others besides that of the expert. Although a personal interview may sometimes reveal all that is required, yet, more frequently, from the very nature of the case, the expert obtains from it no satisfactory results. What a man may happen to say or do, in the course of a brief interview with a stranger, may be of little significance, as compared with his mental mani-

festations during a period of weeks or months, when following the bent of his inclinations without restraint, and with opportunities for carrying his diseased fancies into practical effect. There is nothing singular in this. Medical opinions in regard to other diseases than insanity are seldom founded exclusively on a personal examination of the patient. Facts of the highest importance are often learned from friends and nurses, and could have been learned perhaps only from them, but are none the less valuable on that account.

An opinion respecting the mental condition of a person whose sanity is in question, must be founded upon his previous history; at least, so much of it as may be supposed to throw any light upon his mental condition at some particular time. In a doubtful case, it would only indicate the height of ignorance and presumption to arrive at a positive conclusion on the strength of a single interview, or of any other very limited source of information. Indeed, we can hardly conceive of any case requiring investigation, plain enough to be settled in this manner. We know that patients are, every day, received into our hospitals for the insane, on the strongest representations of friends, yet, for days and weeks together, though subjected to the closest scrutiny, they may betray not the slightest indication of insanity. The power of self-control is exhausted, sooner or later, no doubt, and the disease is evinced by unmistakable evidence; but the fact shows conclusively, that the observation of a man's neighbors and acquaintances may furnish far more satisfactory proof of his insanity, than any single examination of the most accomplished expert. Of course, there is no other way of obtaining the object, in cases where the alleged insanity has disappeared, or the party has deceased.

It has also been objected to the testimony of experts on this subject, that in consequence of their intimate association with the insane, and their familiarity with the manifestations of the disordered mind, they overlook the sharp distinctions that really exist between the sane and the insane condition. Engrossed as they are in their favorite study, they look at all men through a distorted medium, and thus see insanity where others of a different training, see only the normal operations of the mind. That such persons may often see insanity where it is unperceived by others, is just what might and ought to be expected of men of intelligence and discernment, with abundant opportunities for observa-

tion. It would be but a poor compliment to them, to say that after all, the delicate shades of mental disease, the faintest possible lines that divide sanity from insanity, those equivocal phases of mind which neither the philosopher nor the practical observer of men attempt to explain, are no more clearly discerned by them than by others.

The insanity which lies on the surface is obvious enough to all, but it is only the practised observer of the disease, who can detect it in its milder forms, or when controlled and concealed by the sounder operations of the mind. To him, a look, a gesture, a turn of thought, a mode of expression, scarcely discernible by others, may supply a hint that leads to the most satisfactory proofs. It is not common, we apprehend, to suppose that great attainments in a physical science unfit a man for giving reliable opinions on points connected with it; and it is not easy to see any exception to the general rule in regard to insanity, which, beyond all others, can be understood only by means of a long personal observation. It is no presumption to say that the man who has spent the best years of his life in daily intercourse with the insane, is thereby better qualified, other things being equal, to enlighten a court of justice on difficult questions of insanity, than men without such experience, though otherwise intelligent, and, perhaps, with remarkable knowledge of human nature. The proposition seems too clear for argument or illustration, and yet, in practice, no objection to the value of medical testimony on the subject of insanity, is more commonly or more effectually urged, than the one under consideration.

Whatever may be the value of his testimony, the competency of the medical expert as a witness, is unquestioned. The only point not quite settled, is how his opinions shall obtain. In the courts of this State, and of every other, so far as we can learn, the practice is for the expert, after hearing all the evidence in the case, to state the conclusions to which it has led him respecting the mental condition of the party in question.

In *Commonwealth* v. *Rogers*, 7 Metcalf, (1844,) the court said, "the proper question to be put to the professional witnesses is this: If the symptoms and indications testified to by other witnesses are proved, and if the jury are satisfied of the truth of them, whether, in their opinion, the party was insane," &c. "They are not," the court adds, "to judge of

the credit of the witnesses, or of the truth of the facts thus testified by others. It is for the jury to decide whether such facts are satisfactorily proved."

For the first time in this country, a different rule was adopted by the federal court of this circuit, in *U. S.* v. *Mc Glue*, 1 Curtis, (1851.) The medical experts "were not allowed," says the court, Mr. Justice Curtis presiding, "to give their opinions on the case. It is not the province of the expert to draw inferences of fact from the evidence, but simply to declare his opinion on a known or hypothetical state of facts; and therefore, the counsel on each side have put to the physicians such states of fact as they deem warranted by the evidence, and have taken their opinions thereon. If you consider any of these states of fact put to the physicians are proved, then the opinions thereon are admissible evidence to be weighed by you. Otherwise, their opinions are not applicable to this case." No authorities are cited for this departure from the universal practice of the country, but they may all be found in an article on Leading Criminal Cases, published in this Journal for April, 1855. What ground they afford for this mode of obtaining the opinions of experts in questions of insanity, will be made sufficiently obvious by referring to a few of the principal cases.

At the trial of Earl Ferrers, in 1760, his counsel proposed to ask the medical witness, "whether any and which of the circumstances which have been proved by the witnesses, are symptoms of lunacy." Whereupon, the question being objected to by the Attorney General, Lord Hardwicke, who presided as Lord High Steward, observed that it "tended to ask the doctor's opinion upon the result of the evidence," and that he "must be asked whether this or that fact is a symptom of lunacy." 19 *Howell's State Trials*, 943.* More recently in *Regina* v. *Francis*, 4 Cox, C. C. 57, (1849,) a physician who had heard all the evidence, was asked whether from all he had thus heard, he was of opinion that the prisoner, at the time he did the act in question, was of unsound mind. The court, Baron Alderson, interposed, saying, "I cannot allow such a question to be put;" and on being reminded that the question was so put in McNaughton's case, he added, "I am quite sure that decision was wrong.

*This ruling of Lord Hardwicke which we have given in full, precisely as reported, is wonderfully amplified and embellished in Lord Brougham's version of it, contained in his remarks in the House of Lords on the McNaughton case. See 67 *Hansard*, 614.

The proper mode is, to ask what are the symptoms of insanity, or to take particular facts, and assuming them to be true, to ask whether they indicate insanity on the part of the prisoner. To take the course suggested is really to substitute the witness for the jury, and allow him to decide upon the whole case." Shortly after, in *Doe d. Bainbrigge* v. *Bainbrigge*, 4 Cox, C. C. 451, (1850,) Lord Campbell ruled out the same question, and for the same reason. In McNaughton's case, Report of the Trial of Daniel McNaughton, by Bousfield & Merrett, 73, (1843,) the question was put to an expert who had heard the whole trial, "judging from the evidence which you have heard, what is your opinion as to the prisoner's state of mind?" and no objection was made. The judges, in their replies to the questions proposed by the House of Lords in consequence of this trial, say, however, that although "where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the questions to be put in that general form, yet the same cannot be insisted on as a matter of right."

Such are the principal decisions which furnish the authority in the case of *U. S.* v. *McGlue*, for departing from the American practice on this subject. It will be observed that in these cases, the question to the expert, disallowed by the court, was not exactly in the terms of that allowed in the Rogers case, as quoted above. In the former, the opinion is given under the single condition that the expert has heard all the evidence, so that in fact, he passes upon the evidence precisely like the jury. In the latter, there is another condition, — he must suppose the evidence to be true. It is not for him to exercise any judgment on this point, but to regard it as all true, without restriction or qualification. This is an important difference, and it may be fairly questioned whether this additional ingredient in the terms of the query, would not have obviated the practical difficulty contemplated by the English courts. It thus becomes the hypothetical case which they require. It may have no foundation in truth. It may have no more reality than the baseless fabric of a vision, yet for the present purpose, it is to be regarded as true, and made the basis of an opinion. It is immaterial, certainly, whether the hypothetical case is presented in the language of the counsel, or of the witnesses, — whether it is to be received

directly from the latter, or, at second hand, by a tedious process of circumlocution.

That the rule would have been modified in the manner here supposed, seems not unlikely in view of the fact, that in other cases, similar in principle, the question as put in the Rogers case, was allowed, though objected to by counsel. In *Malton* v. *Nesbitt*, 1 Carrington & Payne, 70, (1824,) and *Fenwick* v. *Bell*, 1 Carrington & Kirwan, 312, (1844,) — cases resulting from collision of vessels — where the question at issue was one of negligence or unskilfulness on the part of the master, nautical men who had attended the trial, were asked whether, *supposing the evidence to be true*, the master was, in their opinion, guilty of negligence. In *Beckwith* v. *Sydebotham*, 1 Campbell, 116, (1807,) this mode of putting the question was sanctioned by Lord Ellenborough. The question at issue was the unseaworthiness of a vessel, and eminent surveyors of ships were allowed, upon the evidence of other witnesses, to give their opinion on this point.*

The principal, if not the only objection, to this mode of putting the question to experts, is that it essentially removes the expert from the witness-box to the jury-box, and allows

*The case of *Sills* v. *Brown*, 9 Carrington & Payne, 601, (1840,) and that of *Jameson* v. *Drinkald*, 12 Moore, 148, (1829,) often cited in this connection, will be found, on careful examination, to furnish no support to the rule of evidence we are combating. They were both actions for damages on account of collisions of vessels. In the former the collision arose chiefly from a neglect of the rules of the river Thames, on each side. The question at issue was whether the admitted fault of one party rendered him responsible for the consequences that arose from the admitted fault of the other; whether the departure from the rule of the river which led to the injury was excused by the common practice of infringing that rule? A harbor-master was called, of whom it was proposed to ask, whether, having heard the evidence in the cause, he thought the conduct of the captain of the brig, who had departed from the rule, and thus brought about the collision, was right or not; because, said the counsel, it is a matter of skill, and he compared it to cases in which a medical question arises, and then witnesses are asked, whether, in their opinion, the treatment was correct or not. The court did not see it in this light, and overruled the question, but allowed the opinion of the witness to be taken on a hypothetical case. It was obviously not a matter of skill that could be correctly understood only by experts, but one of plain facts which the jury were perfectly competent to understand and appreciate. What the hypothetical case was, does not appear; but it is obvious that the answer, whatever it was, could not have affected the conclusions of the jury, because, at the best, the witness could only have said, that, in infringing the rule of the river, the captain was not to blame, for the simple reason that everybody else infringed it. On such a point as this, the jury could make up their minds without the aid of an expert. It should be observed that the ground on which the counsel claimed the admission of this testimony, was the similarity of the case to those where medical experts are allowed to express an opinion on the evidence, implying, of course, that in the latter instance, this is the settled rule. In the latter case above referred to, *Jameson* v. *Drinkald*, several nautical men gave their opinions, as experts, touching the alleged negligence, unskilfulness, and error of judgment, manifested by the parties. On the motion for a new trial — for which, however, this mode of examining the experts was not put forth as one of the grounds — two of the judges said, incidentally, it would seem, that the experts should have confined their opinions to the cause of the accident, not the measure of blame attributable to one party or the other; or, as one of them said, a scientific person, called as a witness, is not entitled to give his opinion as to the merits of the case, but only as to the facts as proved by other witnesses. The objection, be it observed, did not lie against the basis of their opinions, but against the opinions themselves, as referring to points with which they had no proper concern. Not a word was said by court or counsel about a hypothetical case.

him to usurp the functions of both judge and jury. How a witness can be said to usurp the functions of the jury, who may, if they please, render a verdict in the very teeth of his opinion, is not very obvious. If the jury chose to shape their verdict by his opinions, they no more surrender to him their functions, than they do to the court or counsel whose remarks may influence their decisions. Neither is it easy to understand, so far as this issue is concerned, why the opinion of the expert upon the facts which have appeared in evidence, should be more objectionable than his opinion upon a hypothetical state of facts, because if the latter is at all similar to the former, his opinion upon it may equally affect the conclusions of the jury. Lord Brougham, in his remarkable version of Lord Hardwicke's decision, seems to have appreciated the force of this conclusion, by prohibiting the expert from giving his opinion upon the evidence in any shape. "You shall ask them," he says, "if such a fact is an indication of insanity or not — you shall ask them, upon their experience, what is an indication of insanity — you shall draw from them what amount of symptoms constitute insanity," "but you must not ask a witness whether the facts sworn to by other witnesses preceding him amount to a proof of insanity." 67 *Hansard*, 614. So, too, in the case cited above, Lord Campbell said, "The witness may give general scientific evidence on the causes and symptoms of insanity, but he must not express an opinion as to the result of the evidence he had heard with reference to the sanity or insanity of the testator." Not a word is said in either case about making a hypothetical statement of facts.

To say that an expert, in expressing an opinion upon the facts given in evidence, is thereby assuming the functions of the jury, indicates a confusion of ideas in a quarter where it would have been least expected. Nothing would seem to be plainer than the distinction between the duty of the jury and that of the expert, and that distinction authorizes no apprehension of their being confounded under any tolerably intelligent administration of the law. The jury are bound to decide for themselves as to the truth of the facts which appear in evidence. What those facts may signify, it is for the expert to say. To render a just verdict, the jury must of necessity rely more or less on the opinions of the experts. So far as those opinions are allowed to influence the verdict, so far may the expert be said to assume the

functions of the jury, but be it observed, in the legitimate performance of his own part. Perhaps the opinion of the expert may be decisive of the question at issue, and thus determine the verdict. And why should it not? If that opinion is correct, it would be highly reprehensible in the jury to disregard it, although not bound by any legal enactments. When a person is convicted of some criminal act, though regarded by men long familiar with the phenomena of insanity to have been insane at the time of its commission, the jury no more deserve the praise of intelligence and courage, than if they had disregarded the calculations of a mathematician on a question of water power.

In the construction of a doubtful rule of evidence, it would seem as if that should be preferred which let in upon the jury in the largest measure, the light of science and liberal knowledge, — directly and clearly, without the intervention of refracting media. What the jury want is light upon the dark points of the case before them. The question is not what may be the expert's views in regard to the mental condition of A, B, C, or any other individual, real or imaginary, but what he thinks of the only person with whom the court has any concern. In a case involving a question of insanity, the expert is called in expressly to give the jury the benefit of his special acquaintance with the subject, — a benefit which he has a right to give, and they a right to receive — and thus assist them in arriving at a correct verdict. For this purpose he hears all the evidence, and carefully forms his opinion upon it. The next step, it might be naturally supposed, would be to express that opinion on the witness stand. But here the new rule is interposed, and the expert is told that he must not utter a word respecting the case, the details of which he has been following day after day, perhaps for weeks together, but he may tell them what he thinks about some other case. The admirable fitness of this rule for promoting the ends of justice must be obvious to the dullest apprehension. The jury, embarrassed and perplexed by a multitude of traits and incidents, the full significance of which is utterly beyond their reach; anxious to get at the truth, but unable rightly to appreciate the facts on which it is to be founded, would gladly avail themselves of the superior insight of men to whom such facts are familiar as household words, but this privilege is refused. — Experts may be called, it is true, but they are to talk about

anything rather than the case in hand — the only case regarding which the jury care to have his opinion at all.

But, it is replied, you may state a hypothetical case, embracing all the essential facts related by the witnesses, and thereby obtain from the expert precisely the same opinion as if the question had been put to him according to the formula used in the State courts. If this is really so, it is not very clear how the technical difficulty is avoided. You may not ask the expert, say the court, whether, supposing the evidence to be true, he believes the party to have been insane, but you may repeat to him in detail all the symptoms and occurrences related by the witnesses, and ask him whether, supposing them to have really happened, the person concerned was insane. If there is any difference between these two propositions, it seems to be very much like that between "Come out here, Mr. McCarthy," and "Mr. McCarthy, come out here." In neither case is the expert bound to believe that the facts on which he founds his opinion, have actually occurred, while in both, it is understood that these facts, whether real or imaginary, are precisely the same. It is hardly credible that a difficulty like this, which could be removed by a paltry shuffling of words, should be allowed to change a rule of evidence universally recognized in the courts of the country. Besides, if the case put to the jury is precisely that which has appeared in evidence, it is but little better than quibbling to call it a hypothetical case. It certainly is regarded by jury and expert as the case which is on trial, and in spite of any modification of language or change of subordinate points, the opinion of the latter will inevitably be shaped by what he has heard from the witnesses. If, on the other hand, a case truly hypothetical is put to the expert, then it needs but little reflection to see that the less it resembles the case exhibited by the witnesses, the less will it enlighten the jury in the formation of their verdict. But this method is not only useless, it is positively mischievous. It is very easy for counsel, by suppressing some circumstances and adding others, to present a case sufficiently like the one on trial, to seem to the jury the same, but really so different as to elicit from the expert, an opinion very different from that he had formed respecting the actual case, and which, perhaps, he had already expressed. The jury are mystified by such apparently contradictory views, and it would not be

strange if they concluded to disregard such deceptive lights altogether, and rely on their own unassisted judgment.

Another objection to this new mode of obtaining an expert's opinion is, that it violates one of the settled rules of philosophy. It is well understood among scientific men that they are not to enter on the discussion of facts that have not been carefully observed, and duly authenticated. The true disciple of modern science will scarcely allow himself to talk of the attributes and incidents of a thing that never had an objective existence, because, if the thing never really existed, we are liable, with our limited faculties and scanty knowledge, to attribute to it incidents more or less incompatible with one another. A hypothetical case must be always open to this objection, that being the offspring of fancy it may be such a case as never did and never could exist in nature; and therefore that the opinion of an expert on such a case must be more or less unreliable. Indeed, nobody supposes that the hypothetical cases stated by counsel always represent cases that have actually occurred, for it is well understood that they may be merely a collection of such particulars as best suit the counsel's purpose. Were we to enumerate a train of symptoms chosen at random, and ask an expert what disease they would signify in a patient who should exhibit them, we should commit no greater absurdity than the counsel does who picks out an incident here and there from a man's conduct and discourse, and then asks the expert on the witness-stand, if he considers them as conclusive proof of insanity.

It would seem as if the soundness of this principle would be instantly recognized by lawyers, with whom it is a sort of professional rule never to give counsel on a supposititious case. We know very well what would be the reply of any lawyer having the slightest regard for his reputation, to one who should seek his opinion in this manner. "If the case you put is merely a matter of speculation or curiosity, I am willing to talk about it, but if you wish my opinion for a practical purpose, on a case that has a real existence, you must state that case with all its particulars, without addition or suppression; and since your imperfect knowledge of these things might lead you unconsciously to misrepresent the case, you had better get a lawyer to state it for you." And yet, when the opinion of an expert on a matter of science is required, distinguished lawyers say he must not

be asked about facts which have been stated with all that precision and completeness which only a judicial examination can secure, but you may draw upon your memory or your imagination for the materials of a hypothetical case, and ask his opinion about that. A fiction, an acknowledged creation of fancy, is supposed to serve the ends of truth and justice better than actual facts!

Thus far we have gone upon the supposition that the rule now advanced, is at least, practicable. Unquestionably, it may be in many cases; but in those cases, by no means few, where the facts touching the mental condition of the party proceed from a cloud of witnesses, each one contributing something towards the general impression which is made upon the mind of the expert, it cannot be strictly carried out without manifest injustice. We had an opportunity a few months ago, of seeing it applied in a criminal trial, in a federal court held in a neighboring district. A ship-master was on trial for beating to death one of his crew, and defended on the plea of insanity. After a large number of witnesses had been examined, the prisoner's counsel proceeded to put the question to the experts in the usual way, whereupon the District Attorney objected, and his objection was sustained in an elaborate opinion from the circuit judge. No better illustration of the folly of the rule could be had than was furnished by the actual result of all the discussion which it provoked on this occasion. The court having pronounced its decision, the following colloquy took place between the court and the prisoner's counsel:

Counsel. — I may assume a state of facts, I suppose?

Court. — Unquestionably that may be done. That is the decision of Judge Curtis.

Counsel. — Then am I to ask the witness thus: Taking all the facts as testified by the mother of the prisoner, the statement of Capt. F., and then the account given by C., &c., what would be his opinion as to the state of the prisoner's mind, or am I to read over my notes, and point out certain facts?

Court. — You can ask your question.

Counsel. — (To witness.) Taking all the testimony of Mrs. H. in regard to the condition and history of her son up to the time of this occurrence of the 22d of January; the statements and testimony of young C. as to the sickness, which, prior to the 22d of January, the prisoner had

endured; all the testimony of his previous life which goes to show his nervous sensibilities; the testimony of Capt. F. and Capt. N. as to the occurrences at the Chincha Islands; and the extent of the injury which occurred to him there; the testimony of C. and F. in regard to the occurrences of the 22d of January, during the whole of that day and the succeeding and following days and nights, until they arrived at P——, upon the assumption and basis that all that testimony is true and believed by the jury, what, in your opinion, was the mental condition of Capt. H. on the 22d of January?"

Here were a multitude of transactions bearing upon the question of the prisoner's mental condition, every one of which it was necessary for the expert to take into the account in making up his opinion. They could not be stated hypothetically in any other language than that of the witnesses, with all the collateral circumstances, and so obvious was this, that neither the opposing counsel nor the court objected; and thus, in this case, the new rule was utterly disregarded. Thus, we apprehend, it must always be disregarded, where the evidence unfolds a large mass of particulars essential to the right understanding of the question at issue.

It is a curious fact, not without some significance, we imagine, if we could but see it, that in all the cases where the new rule of evidence has been applied, the question at issue was one of mental disease, while in cases where it was a question of other diseases or wounds, no objection has been made to the application to the old rule. In the trial of Capt. Donellan for the murder of Sir T. Boughton (1780) for instance, several physicians had stated the symptoms observed before death, and the results of the autopsy after death, when the celebrated John Hunter was called, and examined as follows:

Question. — Have you heard the evidence that has been given by these gentlemen?

Answer. — I have been present the whole time.

Q. — Did you hear Lady Boughton's evidence?

A. — I heard the whole.

Q. — Did you attend to the symptoms her Ladyship described, as appearing upon Sir Theodosius Boughton, after the medicine was given him?

A. — I did.

Q. — Can any certain inference upon physical or chirurgical principles be drawn from those symptoms, or from the appearances externally or internally of the body, to enable you, in your judgment, to decide that the death was occasioned by poison? *

Had the question been whether or not Capt. Donellan was insane when he took the life of Sir T. Boughton, then probably the court would have said, Mr. Hunter must not be asked what opinion respecting the prisoner's mental condition the evidence has led him to form, but he may give his opinion on a hypothetical state of facts. He has no right to believe that a single word which he has heard from the witnesses is true, but you may set up a fictitious Capt. Donellan and a fictitious Sir Theodosius Boughton, and an imaginary chapter of incidents, and ask what he thinks about them. This, and numerous similar instances which might be cited did our limits permit, constrain us to ask, why this distinction? Is it because insanity is supposed to be plead in defence of crime more frequently than it should be, and therefore to be met with every kind of restriction and hindrance which the practice of the law will permit? If this is the reason, we need only say that there never was a greater mistake than to imagine that error or nonsense can be put down by denying it fair play and full discussion.

We are brought to the conclusion that the rule in question is not calculated to promote the ends of justice and humanity; and that a true reform would be to confine the expert to the case in hand as revealed by the evidence, and debar him entirely from giving opinions upon hypothetical cases. Such a course is not entirely without judicial sanction. In the trial of Prescott for the murder of Mrs. Cochran in New Hampshire, (1834,) the defence being insanity, an expert was asked by the attorney-general the following question: "If no act of violence precede or follow the fatal deed, and no apparent motive can be found for the murder, should you believe a homicide to be insane, merely because he has insane ancestors?" To this the prisoner's counsel [Hon. Ichabod Bartlett] objected, simply because it was improper to get the opinion on a supposed case. The attorney-general replied that "the prisoner was

*Trial of Capt. John Donellan, &c., reported by Joseph Gurney. Quoted by Beck II., p. 792.

setting up the plea of insanity on the ground that some remote ancestor of his was crazy; and that the court would perceive that the question was only to get the opinion of the witness on a case precisely such as may be proved to exist in this instance." The court [Chief Justice Richardson] observed "that the question being founded on a supposed case, could not properly be put."*

If we are to have a new rule on the subject to prevent the expert from encroaching on the province of the jury, let it be that laid down by lords Hardwicke and Brougham, whereby the expert is debarred from giving opinions respecting the case on trial, or any other case, and allowed only to answer questions as to the causes, symptoms and other incidents of insanity. In this way very important information would no doubt be kept from the jury, but the mischief arising from hypothetical cases would also be prevented.

Until within a few years it was allowable in this State, as it still is in every other, except Maine, in cases which involved any question of medical or other physical science, for the counsel in the course of their address to the jury, to read from scientific books of established reputation, for the purpose of supporting their positions. They read what books they pleased, and were scarcely restricted in the length of their readings. The extracts thus read constituted in fact, a part of their address, of which the jury might believe as much or as little as they did of any other part of it. They might avail themselves of the information thus presented, or regard them as only a professional contrivance for misleading their sense of right and wrong. This practice, which might have been supposed to be established by right of prescription, was formally prohibited in the case of *Commonwealth* v. *Wilson*, 1 Gray, 339 (1852). The remarks of the court, (Chief Justice Shaw), conveying this extraordinary decision, which reversed the almost universal practice of this country and of England, were quite brief, and do not show very clearly what new light has suddenly dawned on the judicial mind. "Facts or opinions," says the court, "on the subject of insanity, as on any other subject, cannot be laid before the jury except by the testimony, under oath, of persons skilled in such matters. Whether stated in the language of the court or of the counsel, in a

* Report of the Trial of Abraham Prescott for the murder of Sally Cochran, &c., &c. Concord, N. H.: 1834.

former case, or cited from the works of legal or medical writers, they are still statements of fact, and must be proved on oath. The opinion of a lawyer on such a question of fact is entitled to no more weight than that of any other person not an expert." In support of this decision, which we have given entire, there are cited only two cases, *Collier* v. *Simpson*, 5 C. & P., 73, (1831,) and *Cox* v. *Purday*, 2 C. & K., 268, (1846,) and as they are the only cases likely to be referred to for this purpose, it will be proper to give them a careful examination.

In the latter case, there was a question relative to the law of copy-right in Bohemia; and in order to settle this question, the counsel proposed to read the book containing the written laws of that country, but the court decided that "the proper course to ascertain the law of a foreign country, is to call a witness expert in it, and ask him, on his responsibility, what that law is; not to read any fragment of a code which would only mislead." Here the essential question—that on which the verdict of the jury depended—was as to the law of Bohemia on a certain subject. This simple fact it was necessary to prove beyond a doubt, and therefore the written code was offered *as a piece of evidence*, like an account-book or an affidavit. The court, considering that it lacked some element of proper evidence, refused to allow it to be read. Unquestionably, the counsel might have read it in the course of his plea to the jury, but that would not have suited his purpose, which required that it should be presented in such a form that the jury would be obliged to believe it like any other evidence. The other case—*Collier* v. *Simpson*—was precisely parallel. It was an action of slander brought by the plaintiff against the defendant, for saying that he, the plaintiff, had caused the death of a child by giving it an excessive dose of corrosive sublimate. The counsel proposed to show what was a proper dose of this article, by reading from medical books which treated of the doses of medicines; and this the court would not permit. They were offered *as evidence*, not as a part of the counsel's address, in which latter form they would no doubt have been allowed.

If, however, we are mistaken as to the principle decided in these two cases, and it should appear that in order to show what is the law of a country, it is not allowable to read the statute-book in any stage of the trial, then of

course we must admit their authority for the rule, that facts or opinions on the subject of insanity cannot be laid before the jury by reading from medical books; and, if we do not misapprehend the matter, the rule applies to all books whatever from which a scientific fact or opinion could be obtained. We can hardly believe that any court would insist on the universal application of a rule like this, which might keep from the jury information that could not be presented in any other form, and which alone would enable them to make their verdict just. We can easily conceive of cases where common sense and the natural instincts of men would forbid it. On a question of hydraulic power, it can scarcely be doubted that an expert would be allowed to read from a book the algebraic formulæ underlying his opinions. And if he could read the book, why might not the counsel? If, in a case of marine insurance, the counsel should propose to establish some fact respecting the soundings near a certain rock or shoal, by reading from Blunt's Coast Pilot, and were stopped by this rule, who would not feel that an important source of information was shut out, more calculated to affect the result of the case, perhaps, than all the evidence of the witnesses and experts? Again, suppose in a criminal case where the offence occurred several years ago, an essential witness should state that he saw and distinctly recognized the prisoner near the scene of the crime, at 10, P. M., by the light of the full moon, should the counsel be debarred from reading an old almanac to show that on that night the moon did not rise till 12? The idea that the testimony of Professor Pierce or Mr. Bond is competent to establish such a fact, is simply ridiculous, because their knowledge of it would be derived, not from personal recollection, but probably from the prototype of the very almanac which cannot be read. As if evidence which is inadmissible at first hand, becomes entitled to the utmost credence at second hand.

It might, at first blush, be supposed that the rule in question had reference exclusively to medical or other scientific books, but it is clearly and explicitly stated, that facts or opinions on the subject of insanity, as on any other subject, cannot be laid before the jury, except by the testimony, under oath, of persons skilled in such matters." Whether the question at issue be one of physic or divinity, of morals or legislation, navigation or manufactures, no fact

or opinion thereon can be laid before the jury, except on oath. It would seem as if the law itself were not exempted from the general ban, because it is stated that the objection is equally strong against statements of fact or opinion, whether conveyed in the language of court or counsel in a former case, or cited from the works of legal or medical writers. Indeed, in the very trial which elicited this decision, the counsel were not allowed to read, for the instruction of the jury, from the judge's own charge in a previous case. If the court meant to exclude only so much of the charge as conveyed opinions respecting the nature of insanity in relation to crime, then certainly it would be but a fair application of the rule to exclude Coke and Hale and every other writer who has promulgated opinions on this subject. We imagine the profession are hardly ready for this, though the conclusion seems to be inevitable.

The rigid application of the rule would also much abridge the latitude of remark allowed to counsel in addressing a jury, yet so far as opportunity has been afforded, we have failed to see any difference in this respect. In that very court, a year or two since, we heard the counsel in a case involving the question of the mental condition of one of the parties, relate his personal experience in insanity while a trustee of the McLane Asylum. It was strictly pertinent to the case in hand, and well calculated to enlighten the minds of the jury on an obscure point; but, though neither court nor counsel objected, it was in direct conflict with the rule, for certainly here was a statement of fact and opinion laid before the jury by one not under oath, and therefore not more admissible than similar statements drawn from a book.

It would seem as if the practice universally allowed to counsel in this country, of reading books in the course of their address, must have been attended by grave inconveniences, or open to very serious technical objections, to warrant this total and summary abolition. In the authorized report of the case quoted from above, it does not appear what these objections are, with the single exception, briefly stated by the court, that it infringes the well-known rule of law which requires that all statements of facts must be given under oath. It must strike the dullest observer as a very curious fact, that a practice like this should have prevailed here and in England, until quite a recent period,

without the least suspicion that it was an infringement of a well settled rule of law. Indeed, this fact alone is calculated to destroy the validity of the objection, for the idea of a rule being well settled which is daily infringed without the cognizance of those who ought to know it best, implies something very like a contradiction in terms. All this confirms the construction we have put upon the two cases relied on as authority for the rule, (one of which, it will be observed, occurred twenty years before,) viz., that the point they decided was, that books could not be read as evidence to be received by the jury like other evidence, and consequently believed if credible and not contradicted, though allowable as a part of the counsel's address to the jury, and which, like any other part of it, the jury may believe or not, as they please.

Whether or not the rule in question was required by professional considerations, its tendency is, as already intimated, to shut out important information, and to that extent defeat the ends of justice. It is easy to say that a scientific fact or opinion must proceed only from the mouth of an expert, but a little reflection will show that sometimes the rule must imply an impossibility. The fact or opinion may be true, and yet not known to any accessible expert. In the rapid progress of modern science individuals of distinguished reputation perhaps may be left behind, and the knowledge which is essential to the cause of justice, they may be unable to furnish. In a case of suspected poisoning by arsenic, for instance, an expert might express the opinion that the deceased was killed by arsenic, because, although the contents of the stomach and intestines showed no trace of this mineral, it was found on analysis in the liver or spleen. Better proof than this could not have been had not long since; the jury would have convicted the prisoner on the strength of it, and the court would have approved of the verdict. But supposing the prisoner's counsel should ascertain, as he might at the present day, that the validity of this test had been recently impugned; that a distinguished chemist had found, by a course of satisfactory experiments, that arsenic could be detected in the liver or other viscera, where poisoning had not and could not have been suspected, as well as in many other substances not usually supposed to contain it, yet under this rule his client is to be denied the benefit of this discovery, and in consequence thereof,

be punished for a crime, perhaps, which he never committed. No expert whom he could call has ever repeated the experiments, and the book which contains them cannot be read to the jury. Thus, in order to avoid a technical difficulty of doubtful existence, an innocent person is convicted on the ground of a scientific conclusion known to be false.

It should also be considered that the attendance of experts, however necessary it may be to secure the ends of justice, cannot always be commanded. The trial may be in a place remote from any populous community where such persons naturally congregate, or the party is unable to incur the expense of engaging their services. If neither books nor experts can be used in a case involving questions of science, then the jury are without any means of arriving at the merits of the case, and their verdict is as likely to be wrong as right. Are we willing, is it proper that cases of this description should be submitted with no other light than such as common witnesses can furnish?

Books are inadmissible, it is said, because they cannot be cross-examined. Neither Esquirol, nor Astley Cooper, nor John Hunter, nor any other scientific celebrity, could have avoided a cross-examination, if they had been put upon the witness stand, and shall we allow them to do by means of their books what they could not do by word of mouth? This argument would be valid, no doubt, were books really offered as evidence, but since they are merely presented to the jury to receive as much or as little weight as they choose to give them, there is no propriety in excluding them because they lack an essential attribute of evidence. If the book cannot be cross-examined, we must also consider that it has not the same weight as a living witness. In many respects, however, the book has an advantage over the witness as a means of eliciting truth on a difficult question of science. Its facts are accurately stated, its conclusions are carefully and deliberately matured without the possibility of being warped by any casual bias, and their correctness is guaranteed, perhaps, by the distinguished reputation of its author. The witness, on the contrary, under the unusual embarrassments of a harassing examination, is apt to say what in his cooler moments he will not thoroughly approve, and lay down principles without those qualifications which a little farther reflection would suggest. Professional rules and modes of procedure sometimes lead to principles and practices rather

startling to the unsophisticated common sense, but we pardon the evil for the sake of the greater good which can be obtained so well in no other way. But to choose the extemporary utterances of a witness rather than the matured conclusions of a good book, "the precious life-blood of a master-spirit," as Milton calls it, would seem to be one of those unfortunate positions into which only the most inevitable necessity could force us.

It has also been objected to the practice of reading books, that, as no restrictions can be placed on it, the jury are unable to discriminate between such as are really entitled to be regarded as authorities, and such as are not so regarded by those most competent to judge. To them all books are alike — one entitled to as much credit as another. Such, no doubt, is the fact, but we are inclined to believe that in practice it never leads to erroneous conclusions. Counsel would hardly venture to effect their purpose by reading the books of obscure or visionary authors. If a sense of professional honor would not deter them, the certainty of exposure from the opposite side probably would. In looking over the reports of trials where the practice in question was allowed, we have not met with a single instance in which counsel availed themselves of their privilege to effect their purpose by means of worthless books. But should the attempt be made, there would seem to be no practical difficulty in requiring of the court suitable direction on the subject. Considering the frequency with which questions of insanity are submitted to judicial investigation, is it expecting too much of judges that they should make themselves familiar with the leading works on the science? We are glad to see that one of their own number regards such studies as a matter of professional duty. "I believe," says he, "that those judges who carefully study the medical writers, and pay the most respectful but discriminating attention to their scientific researches on the subject, will seldom if ever submit a case to a jury in such a way as to hazard the conviction of a deranged man." (Hornblower, C. J., 1 Zabriskie 196.)

The common law has been called by an eminent legal writer, "the precipitate of the wisdom of all ages — all professions — all countries."* The statement may be somewhat exaggerated, but it would have been utterly devoid of

*Wharton on Mental Unsoundness, 36.

truth, we may be sure, had not the light of science been sometimes admitted into its dark and devious passages. The great luminaries of the law, so far from despising the teachings of science, were careful to learn and understand them thoroughly, wherever it had any bearing upon professional points. On the subject of insanity Lord Hale must have made himself familiar with all the learning of the time, the latest as well as the oldest, and received its results in a docile spirit, before inditing that passage in the "Pleas of the Crown," which has guided the opinions of the profession on the law of insanity almost up to the present moment. Very different from this, we fear, is the spirit in which this subject has been too often regarded in later times. Instead of being carefully studied by the light of modern investigation, its doctrines have been frequently treated as the speculations of visionary men, used by ingenious counsel for the purpose of screening their clients from the consequences of their crimes, when all other means have seemed likely to fail; and the men who unwillingly turn away from their customary duties to contribute the results of their large observation towards the furtherance of public justice, are they not habitually viewed as intruders into a province that does not rightfully belong to them?

The question whether a person is or is not insane, is not one of simple fact, but rather of inference from certain facts. Such and such phenomena being given, required their psychological significance; and the answer to this question should ever faithfully represent the actual state of psychological science. And inasmuch as this has not been stationary, the answer at different periods must have been marked by diversity and change. Uniformity, instead of being necessarily a test of truth, might have been only an indication of ignorance and presumption. To say that we are no better prepared to answer the question than our forefathers were in the days of Lord Hale, is virtually to ignore the existence of those establishments where the phenomena of the disease are exhibited on a large scale; of those distinguished observers who have given their days and nights to the study of its victims; of those works which contain the fruits of so much toil and thought. If we admit that these things do really constitute a better preparation for the duty, shall we deny ourselves the benefit of any one of them? You are willing to hear a living man, however feeble his

utterance, but greater men who speak to the world only through their imperishable works, are condemned to silence. Why be guilty of a folly like this? If the common law is ever to deserve the merit which some of its advocates already claim for it, of faithfully reflecting the general enlightenment of the age, it must welcome the teachings of science and place no obstacles in the way of its communication. J. R.

United States District Court. Massachusetts District.

April, 1858.

In Admiralty.

THE BARK HAVANA,—William Davidson, *Claimant.*

The District Court may, but is not bound to exercise jurisdiction in favor of a British subject against a British vessel.

By the maritime law, a master has no lien on his ship for his wages.

By statute of 17 & 18 Victoria, such a lien is given to masters of British vessels.

The lien so given may be enforced in the Admiralty courts of the United States.

SPRAGUE, J.—This is a libel against a British vessel by a British subject domiciled abroad. In such case the court may, but is not bound to exercise jurisdiction. It will do so for the purposes of justice, and the more readily if no objection be made by the Consul of the nation to which the vessel belonged. This libel is by the master of a ship for his wages. In such case the maritime law gives no lien; but upon British vessels such a lien is created by the merchant shipping act, 17 and 18 Victoria, c. 104. The question is whether this court should enforce this statute. It is to be observed that it creates not a mere remedy but a right. It gives security; the lien is a *jus in re*, and should be enforced wherever the *res* may be found. Cases analagous to this have come before this and other courts of the United States. The maritime law gives no lien upon a domestic ship. Several of the States have by statutes given liens to material men for supplies furnished to a vessel in her home port. In such case, the Admiralty Courts of the United States take jurisdiction and enforce the right thus created by the State laws; and, being in its nature maritime, this is the same in principle as the case now before me. In those cases the

courts recognize and enforce only the right created by the local laws—not the remedy. In some cases, as in the first act of Massachusetts upon that subject, no process was provided, and the right was enforced only in this court; and when, as in the subsequent Massachusetts statutes, a remedy is given in the State tribunals, still this court applies its own remedy and mode of procedure. The circumstances of the present case illustrate the propriety of exercising jurisdiction to enforce the lien created by the acts of Parliament which have been cited.

The ship arrived in Boston in September last, owned by a British subject living in St. John, New Brunswick. A creditor of the owner, also a British subject residing in St. John, and where the debt was contracted, came to Boston, obtained process from a State court, by which the vessel was attached, and he afterwards recovered judgment and took out an execution by virtue of which the ship was sold by the sheriff, and the creditor became the purchaser, and is now the claimant in this suit, contesting the right of the libellant. The master who brought this vessel to Boston, had commanded her for two years at stated wages, and had a large amount due to him. He had, by the laws of his country, security upon his ship, on which he had a right to rely, and doubtless did rely, in giving so extended a credit to his owner, who has become insolvent. The courts of this country have sustained the application of a British creditor who had no security upon the ship, and caused her to be arrested and sold for the payment of a debt existing only by virtue of British law. And now another British subject, having a higher and paramount right under the British law, appeals to a court in this country for a remedy. To refuse his application would be to sustain by our tribunals the inferior and subordinate claim of one British subject, and refuse the higher and paramount right of another. It would not only be doing injustice to the libellant, but a friendly nation might well complain of such a perversion of her law by a partial administration of it. That the sale by the sheriff did not divest or impair the lien, has recently been decided in this court. Indeed this point has not been raised by the intelligent counsel for the claimant in this case. The only remaining question is for what sum a decree shall be rendered. The accounts of the libellant contain items to the amount of between four and five hundred dollars, which are disputed.

As these, or some of them, may depend upon British law and usage, I shall invoke the aid of the British Consul, by appointing him an assessor to ascertain what amount thereof, if any, should be allowed.

J. Hardy Prince, for libellant.

Abraham Jackson, for claimant.

The Brig Erie.

A charter party will not be construed to be a demise of the ship, although her whole capacity is let; unless the possession is transferred to the charterer.

By the maritime law, when a ship is chartered to one or more parties out and home, freight will be due to each port where cargo is delivered, though the ship is lost on her return home. By the maritime law, freight is due as far as the charterer has had the beneficial use of the vessel.

The owner and charterer as between themselves may make the whole freight, in such a voyage, to depend on the safe arrival of the ship at her home port, or on any other contingency.

But when they make the freight to depend on any farther condition than the safe delivery of the cargo, this will not affect the right of others who have an interest in the freight, as seamen for their wages, or lenders on bottomry.

They trust to the ship, and have their rights against the freight as appurtenant to the ship; and as far as she has earned freight, by the maritime law, their rights cannot be impaired by any private agreement between the owner and charterer, to which they are strangers.

When a vessel is chartered at a monthly freight on a round voyage to one or more ports, and the language of the contract leaves it doubtful whether the voyage is single or divisible, for the purpose of freight, the presumption is that it is divisible, and against the waiver by the owner of his legal rights. And this presumption holds, although the freight is made payable after the ship returns to her home port.

But if she is chartered for a gross sum for the round voyage, and that by the terms of the contract is made payable after her return to her home port, *it seems* that the presumption is, that the whole voyage is one and indivisible, and that no freight is due to the owner until the whole is completed.

But if not made payable on that or any other contingency than the delivery of her cargo, the presumption of the law is, that it is a divisible voyage.

This was a libel *in personam*, by the owners of the brig Erie against the charterer for the charter or hire of the vessel. The brig was chartered for a voyage from the port of Boston to Port-au-Prince and back to Boston. The charterers were to have the use of the whole vessel except what was required for the use of the crew and for the stowage of the sails, &c., and to pay "$1,800, and all port charges, pilotage, and lighterage, and to advance to the captain what

money he may require to disburse the vessel at Port-au-Prince, not to exceed one half of the freight." There is a further provision that "the charterers or their agent are at liberty to re-charter this vessel, or to take freight therein, and that the master shall sign bills of lading for all lawful merchandise laden on board said vessel during the voyage aforesaid, at the rates of freight by terms contracted for, as they or their agent may require, without regard to the terms of this charter." Under this contract, the brig sailed from Boston, Oct. 25, 1856, and arrived at Port-au-Prince Nov. 10, and safely delivered her outward cargo. The master there took up four dollars only, to disburse the vessel. She took in a full cargo and sailed December 3d, and was totally lost on the return voyage.

R. H. Dana & Parker, for the libellant.

Brigham, for the respondent.

The counsel for the libellant cited and relied on *Marquand* v. *Banner*, 36 Eng. L. & Eq. 139; *Mackrell* v. *Simmond*, Abbot on Shipping, 466; *Havelock* v. *Giddes*, 10 East., 550; *Brown* v. *Hunt*, 11 Mass., 45; *Lock* v. *Swan*, 13 Mass., 76.

The counsel for the respondent relied on *Byrne* v. *Paterson*, Abbot on Shipping, 566; *Barker* v. *Cheviot*, 2 John. 352; *Pennayer* v. *Hallet*, 15 John., 332; *Coffin* v. *Storer*, 5 Mass., 352; *Towle* v. *Kettell*, 5 Cush., 18; *Blanchard* v. *Bucknam*, 3 Greenl., 1; *Peste* v. *Robertson*, 1 John., 26.

WARE, J. It is contended for the libellant that this is a contract for letting the vessel, and not a contract of affreightment; and that though the loss by an accident of major force may excuse the hirer from the return of the vessel, it will not exempt him from the payment of the stipulated hire; and the case of *Marquand* v. *Banner*, 36 Eng. Law and Eq. Rep., 139, is referred to as directly in point. That was a charter of very complicated conditions. Like this it was for a gross sum. The vessel was to be used by the charterers as a general ship, as this might be; and the master was to sign bills of lading without reference to the charter, on such terms as the charterers might direct, as is also provided in this charter; for an action on a bill of lading, the question arose to whom the freight was due and payable, — to the ship owner or the charterer. The court held, that as the charterers were to pay a *lump sum* for the

use of the vessel not dependent on her earnings, that the freight accrued to the charterers, and that the master in signing the bills of lading acted as their agent, and not as the agent of the owners. It is true that the judge, who pronounced the judgment of the court, at the close of his opinion, says that the charterers must be considered as the owners of the ship. But taking the whole of his reasoning together, it is evident that his meaning was only that they were owners in relation to the accruing freight, and not owners for all purposes. A charter party, in order to amount to a demise of the ship, and clothe the charterer with all the rights and liabilities of owners, must transfer the possession of the ship as well as a right to the profits of her employment. *Drinkwater* v. *The Spartan*, Ware's Rep., 156 – 159. In this case the owner retained the possession by his own master and crew, and the general rule, to which there, perhaps, may be rare exceptions, (*Trinity House* v. *Clarke*, 4 Maule & Selwin, 233,) is, that although the owner lets the whole capacity of the ship, yet if he appoints the master and crew, it is not a demise of the ship, but a contract of affreightment. Taking this to be a charter of affreightment and not a letting of the ship, the only question raised by the libel and answer, is whether on these admitted facts anything, and if so, how much, is due under this charter. This depends upon the construction of the contract, whether the voyage out and home was a single indivisible or a divisible voyage.

It is apparent on the face of the contract, that the parties anticipated only a prosperous termination of the whole enterprise; and as such a disaster as occurred did not enter into their calculation as a probable event, it was not provided for. The court is therefore left to infer, in the best way it can, what provision would have been made, if such a disaster had been contemplated as a possibility.

There are two sources to which recourse may be had to guide our judgment in coming to a conclusion. *The first* is the contract itself, in all its terms and conditions. If those show to a tolerable certainty, or a reasonable probability, what their intentions may have been, if, in fact, they had any, which is, perhaps, hardly probable, then this instruction ought to prevail. *The second* is the law which regulates and governs the subject matter of the contract, when not affected by the special agreement of the parties.

For all persons, when entering into engagements, of whatever kind, are presumed to know the law, and must be considered as making them with reference to it. The law, therefore, according to the presumed intentions of the parties, comes in as a supplement to their contracts, and measures and regulates their rights and obligations where the contract is silent.

In the first place let us look at the law. By the maritime law, when a ship is chartered for a foreign port and back, if she delivers her cargo at the outward port, the freight is earned and due. It is the price of that service which has been performed, and it is then due and payable, unless by special agreement it is made dependent on the safe arrival of the vessel at her home port, or on some other contingency. This is shown by the common form of a bill of lading. The goods are to be delivered to the consignee, he paying freight. If she is hired or chartered for several ports in succession, and proceeds on her voyage and delivers cargo at two, three, or more, and, after prosperously prosecuting her enterprise to the last outward port of delivery, is lost on her return for her home port; freight will be due, as well as wages, to the last port where she has delivered cargo, unless the law is controlled by the special terms of the contract, so that it is made to depend on some further condition beyond the safe delivery of the goods. There may be a partial exception in charters for a purely trading voyage along the coast, called in the French law a voyage *en caravan*, in which, according to *Emerigon*, the whole is but a single voyage; and though in this, a sort of retail trade, the freight is collected from time to time, wages are not earned, and, perhaps, charter not due until the voyage is completed, *Dis Assurances*, Liv. 13, § 3, 2. This, however, is but an exception, and the general rule is, that the hirer shall pay freight on charter as far as he has had the beneficial use of the vessel, notwithstanding that by an accident of major force she has been prevented from performing the whole service for which she was engaged.

But parties for the purposes of freight, *as between themselves*, may consolidate all these voyages into one. The common law, which favors the unity and entirety of contracts, when there is but one agreement, though more than one thing is to be done under it, in a doubtful case may incline that way. But this is a maritime contract, and the

maritime law easily renders contracts divisible when the justice and equity of a case require it. The charter of a vessel for a single foreign port and back, or to a number of successive ports and home, is not made on one indivisible voyage because engaged for by one agreement, nor because it is called one in that agreement; but for the purposes of freight, which in its largest and most general sense means the hire of the ship. 1 Valin, p. 639, Tit. Du Fret. As it is also for wages divided into as many voyages as there are ports of delivery. The ship owner and charterer may, by special agreement, make them all one voyage as between themselves, and suspend the rights to freight for the whole on the safe arrival of the ship at her home port. But the presumption is otherwise; and however clear this may be on the terms of the contract between the owner and charterer, it will not affect the right of third persons, who have an interest in the freight. Notwithstanding any such agreement, freight will be earned at each port of delivery for the benefit of the seamen and the holders of bottomry bonds, who have an interest in the freight. They are strangers to the contract, and their rights cannot be bargained away by the owner and charterer. I have seen, says *Emerigon*, in a great many (*une foule*) charter parties, a provision for the forfeiture of half the freight, in case of an infraction of the contract. But, he adds, this conventional penalty cannot affect the privilege of the seamen, nor the lenders on bottomry. The reason is, that they have given credit to the ship. She, with her appurtenances, is their debtor, and the ship, by the maritime law, has earned full freight by the delivery of her cargo. The seamen and the bottomry creditors have a privilege against this freight, and have a right to proceed against it as appurtenant to the ship, on their maritime hypothecation, before it is absorbed or diminished by any private agreement between the ship owner and the freightor. *Contrats a la Grosse*, Chap. 4, §§ 13–2. *Pitman* v. *Hooper*, 3 Sumner 336. The case stated by *Emerigon* does not, indeed, directly apply to this case, for this is a controversy between the owner and the charterer; and the owner, where the rights of third persons are not involved, may make the payment of freight depend on what conditions he pleases. I refer to the opinion of this eminent jurist to show how clear it is, that by the maritime law, freight is earned *for the ship* at every port where

cargo is delivered. Now no one is ever presumed to waive any of his rights; when the question arises, therefore, in the construction of a charter party, whether freight is due at a port of delivery, if on the whole instrument it is left doubtful, it would seem that the conclusion should be in favor of the owner. For if it be granted that the stipulation for the freight is the language of the owner, the rule that words are to be construed, must be strongly against the party using them, is the last rule of interpretation to be resorted to when all others fail. *Toull Droit Francais*, Vol. 6, No. 323–324, Dig. 45., 1–99.

We will now look at the terms of the contract. The charter describes the voyage out and home as one voyage. But this is not decisive. In fact, it is of but little significance. The same descriptive words are often, if not commonly, used where the vessel is intended for several successive ports, and it is the universal formula in seamen's contracts; but it is never construed to deprive them of wages up to the last port of delivery, whatever may be the ultimate fate of the vessel. In order to give to this language the effect of consolidating the outward and homeward voyages into one, for the purposes of freights, it must be made to appear from other conditions contained in the instrument, or from its whole tenor, that such was the intention of the parties.

If the freights stipulated for in this charter party had been a monthly freight, I should think that there would be little difficulty in allowing charter under this contract to Port-au-Prince, and for half the time the brig lay there. And the case of *Brown* v. *Hunt*, 11 Mass. Rep., 41, and *Locke* v. *Swan*, 13 Mass. Rep. 76, would amply justify the decision, if any authority would be needed. There are decisions, it is true, that have a different aspect, *Patteson* v. *Byrne*, Abbot on Shipping, 560; *Coffin* v. *Stover*, 8 Mass., 252; *Blanchard* v. *Bucknam*, 3 Greenl., 1. But these, I think, stand on the better reason, and are more in harmony with the spirit and equity of the maritime law.

But the charter here stipulated for, is a single gross sum. This looks as though the parties intended a single and not a divisible contract. When the hire is fixed by a monthly sum, though the voyage is described as one, I think the presumption of the maritime law is, that for the purpose of freights, it is divisible into as many voyages as there are

ports of delivery. Freight, the hire for the use of the vessel, is due as far as the charterer has had the beneficial use of it, which is to the last port where cargo is delivered. But when the owner stipulates for a single gross sum to be paid on the return of the ship to her home port, he makes the voyage apparently one. But in either case, this presumption is liable to be controlled by other conditions in the charter showing a different intention. Still this appears to be the natural inference, and I think it belongs to the party who draws it, to show that the natural conclusion is not the just one.

In looking into this charter party, we find that so much of the freight as should be required to cover the disbursements of the vessel at Port-au-Prince was payable there. So much must be considered as earned before the completion of the round voyage, and this might amount to one-half, but was not to exceed that sum. Upon this stipulation it may be fairly asked, as it was by the libellant's counsel, does it not open the contract and let in the equity of the maritime law? The whole of the outward freight is there demandable on the happening of a certain contingency. One might feel inclined to pause on this question; but it is said that this precise point has been decided by the Supreme Court of this State in the late case of *Towle* v. *Kettell*, 5 Cush., 10. That was a charter party for a voyage from Boston to Wilmington, N. C., thence to Cape Haytien, and thence back to Boston, for a gross sum of $1500. So much was payable at Hayti as the master might require for the disbursement of his vessel, and the balance on the discharge of the cargo at Boston. The vessel made the voyage to Hayti and there delivered her cargo, and was lost on her return to Boston. The court held that it was a single indivisible voyage, and that no freight was due. The only difference between the two cases is this; in that case the balance of the freight not required to disburse the vessel was, by the *terms of the charter party*, made payable on the vessel's arrival at Boston. In the present case, the time and place for the payment of the residue of the freight is not fixed by the contract, but is left to be determined by the law. The distinction, it may be said, is a narrow one. But if the cases in which the courts have been called upon to interpret charter parties, where the performance of the entire contract has been prevented by a fortuitous event, are criti-

cally examined, it will be found that they have turned on distinctions so minute and subtle that, as is remarked in the case of *Towle* v. *Kettell*, one decision can hardly be relied on as authority for another, unless there is between them a perfect identity. The just rule of interpretation is, I think, that suggested by Lord Mansfield in the case cited from Abbot on Shipping. If there be anything in the contract from which it can be inferred that the parties contemplated a divisible and not an indivisible voyage, for the purposes of freights, it ought to be held to be divisible. This is in conformity with the general rule of law, and meets the justice of the case. This contract made the voyage divisible in a certain contingency and to a certain extent. Beyond that, no intention is expressed. The balance of the freight is not made payable after the vessel returns to her home port, as was the fact in all the cases cited by the respondent; and it cannot, therefore, be pretended, as was urged by Lord Kenyon in the leading case of *Byrne* v. *Patteson*, that the contingency has not happened on which the freight is payable.

My opinion, on the whole, is that one half the stipulated freight is due, deducting four dollars advanced at Port-au-Prince.

The decree will be for $396, with interest from the time of filing the libel, and costs.

RECENT ENGLISH CASES.

House of Lords.

VICKERS *v.* POUND.

Legacy — Construction.

Testator gave a legacy of 2000*l.* to A, "subject nevertheless, and I hereby charge the same with the payment of the following annuities and sums of money," (then followed three small annuities to B, C and D;) and in another part of the will it was provided and declared, "that I do not intend by the legacy hereinbefore bequeathed to my nephew A, to exonerate or release him from the debt which may be due to me from him at the time of my decease," but that the debt should be taken as satisfaction in whole, or part, of the legacy. A was indebted to the testator, on her death, in the full sum of 2000*l.*, and was insolvent. *Held*, (affirming the judgment of the Lords Justices, LORD WENSLEYDALE dissenting,) that the annuities to B, C, and D, were payable out of the general assets.

BAGSHAW *v.* SEYMOUR.

Joint stock company — Directors' liability to third persons for false representations.

The chairman of a mining company, by falsely representing to the Stock Exchange that two-thirds of the shares had been taken and paid up, procured the stock to be entered on the official list. A stranger, seeing the stock so entered, and knowing the rule that no such stock was entered unless so paid up, and believing the fact to be in accordance with the representation, bought some of the stock on the Exchange. *Held*, (affirming the judgment of the Exchequer Chamber,) that the purchaser had a right of action against the directors for the fraudulent representation.

Judicial Committee of the Privy Council.

ALLEN *v.* MADDOCK.

Will — Parol evidence to incorporate unattested documents.

A wrote a paper purporting to be a will, but it was not properly executed. She afterwards made and duly executed a paper purporting to be a codicil "to my last will and testament," but the codicil did not further describe the paper. *Held*, that parol evidence was admissible to show that the informal paper above mentioned was intended to be referred to as her will.

DOE d. BRODBELT *v.* THOMPSON.

Will — Devise — Revocation and substitution.

Testator devised his house in S. to A, his heirs and assigns forever. In a codicil, made a few days after, he said, "I hereby revoke the gift of my house in S. from A, and give it to B; also with the furniture of the said house." *Held*, (reversing the decision of the Supreme Court of Jamaica,) that the gift to B was only a life estate, and that the fee passed under the residuary clause contained in the original will.

DIMECK *v.* CORLETT.

Charter party — "Reasonable speed."

A charter party described the ship as "at anchor in the port of Malta, being tight, &c., and every way fitted for the voyage," and that she should with all convenient speed proceed to Alexandria to load, &c. At the date of the contract the ship was not finished and not coppered, and she was not ready to sail for about a month. Both parties lived at Malta; and the vessel, when ready, proceeded to Alexandria, when the freighter refused to load her. *Held*, that as no certain time was fixed in the charter party within which the vessel was to be ready, and as no damage was shown to have been suffered by the charterer, he was liable to an action for not loading.

Exchequer Chamber.

PEMBERTON *v.* CHAPMAN.

Married woman, — Executrix.

Held, (affirming the judgment of Q. B.,) that payment to a married woman who was appointed executrix, but whose husband afterwards refused his assent to her acting and who was never confirmed by the Probate Court, by a debtor to the estate, who knew that she was married, but knew nothing as to her husband's assent or dissent, was valid.

THOMPSON *v.* HOPPER.

Marine insurance — Time policy — Unseaworthiness — Proximate cause.

To a declaration on a time policy, the plea was that the plaintiffs wilfully, wrongfully and improperly, sent the vessel to sea in an unseaworthy condition, and allowed her to remain near the shore in that condition, and by reason of the premises she was lost.

The evidence showed that before the rigging of the vessel was fully completed, she was sent out of the harbor into an open roadstead, for the purpose of taking advantage of a spring tide, and was anchored there to complete the equipment, and while so anchored a sudden storm arose which caused her to drag her anchor, and she was lost.

The jury found that she was sent to sea by the plaintiffs seemingly in an unseaworthy state, but that the unseaworthiness was not the cause of the loss.

Held, (reversing the judgment of Q. B.,) that the verdict was rightly entered for the plaintiffs.

LINDO *v.* SMITH.

Unlicensed broker may recover money paid.

The plaintiff, an unlicensed broker, was employed by the defendant to purchase scrip in a public company on the London Stock Exchange. He bought the shares and paid the price to the seller according to the usage of the Exchange. *Held*, (affirming the judgment of C. P.,) that he could recover the money paid for the shares, but not a commission as broker.

WAITE *v.* THE NORTH EASTERN RAILWAY COMPANY.

Action for negligence — Infant.

In an action by an infant of five years old, against a railway company for personal injuries, the jury found that the accident was caused partly by the negligence of the defendants, and partly by that of the person in whose care and control the child was at the time. *Held*, the plaintiff could not recover.

THE BRITISH EMPIRE SHIPPING COMPANY *v.* AMES.

Shipwrights' lien.

The defendants, shipwrights, received a ship of the plaintiffs into their dock to repair, there being no separate charge for the use of the dock during the repairs; after the repairs were completed, the defendants retained the ship by virtue of their lien, and gave notice that they should charge 21*l.* a day for the use of the dock during the detention. *Held*, (affirming the judgment of Q. B.,) that they were not entitled to payment for the use of the dock during the detention.

TANDON *v.* JERVIS.

Arrest, what amounts to.

A sheriff's officer holding a warrant to arrest the plaintiff on execution, went to his house and attempted to enter at an open window; the plaintiff's daughter opposed his entrance, and succeeded in shutting and locking the window. During the struggle, a pane of glass had been broken, and the officer, putting his head through the broken pane, touched the plaintiff, saying, "you are my prisoner," and considering this to be an arrest, broke open the door and took the plaintiff. *Held*, a good arrest.

Queen's Bench.

HALLIDAY *v.* MORGAN.

Horse — Warranty — Soundness.

Congenital shortsightedness in a horse, the result of an unusual shape of the cornea of the eye, and which causes the habit of shying, constitutes a breach of the warranty of soundness.

BENONI *v.* BACKHOUSE.

Statute of Limitations — When cause of action arises.

The defendant, by working mines on his land, diminished the support of the plaintiff's ancient messuage, and much damage ensued. The working was more than six years before action brought, but the damage was within the six years.

Held, that the cause of action was the injury to the plaintiff's right of support, and that the statute of limitations ran from the time when the act was done which was the cause of the damage, and not from the time when the damage arose.

CUCKSON *v.* STONE.

Master and servant — Temporary incapacity.

By an agreement between the plaintiff and defendant, the former was to serve the latter for ten years, as a brewer, at weekly wages. The plaintiff had an attack of illness which incapacitated him from work for thirteen weeks, at the end of which time he returned and resumed his work. *Held*, that he could recover his wages for the thirteen weeks.

JACKSON *v.* FOSTER.

Life insurance — Whether assignee in insolvency is holder for value.

A policy of life insurance contained a condition that it would be void in case of suicide of the assured; "but if any third party have acquired a *bonâ fide* interest therein, by assignment, or by legal or equitable lien for a valuable consideration, or as security for money, the assurance shall be valid to the extent of such interest." The assured became bankrupt according to the laws of a foreign country where he resided, and soon after committed suicide. *Held*, that his assignee was not entitled as a purchaser for value.

KLEINWORT *v.* SHEPARD.

Marine insurance — Capture and seizure.

A policy of insurance on a voyage from Macao to Havana contained the words, "warranted free from capture and seiz-

ure." The Chinese emigrants who were on board, piratically and feloniously assaulted the captain and crew, and took the vessel, whereby she was lost. *Held*, a "seizure" within the warranty.

WATSON *v.* MOORE.

Money paid by mistake — Liability to refund.

The plaintiff took up a bill of exchange signed by A, his client, held by the defendant, and due Oct. 16, by mistake for another bill of A, due Oct. 18. On the 19th of October he demanded the money back from the defendant, who refused to refund it.

Held, that as the defendant had been prevented from giving notice of the dishonor, he was not liable to refund the money.

BROWN *v.* THE ROYAL FIRE INSURANCE COMPANY.

Fire insurance — Election to repay or reinstate.

Defendants insured plaintiff's building by a policy which gave them the election to pay the amount or reinstate the premises. A fire having occurred, the company elected to reinstate, and were proceeding to do so, when the commissioners of sewers, under the powers granted them by law, caused the buildings to be pulled down, as dangerous. The dangerous state of the buildings was not caused by the fire. *Held*, that the defendants having elected to rebuild, and failed to do so, were liable to an action for damages.

Crown Cases reserved.

REG. *v.* CHRISTOPHER.

Larceny — Finding of lost property.

A finder of lost property is not guilty of larceny in appropriating it to his own use, unless he had at the time of finding, a felonious intent.

REG. *v.* ROBINSON.

False pretences — Are dogs chattels?

Dogs are not chattels within the act concerning false pretences. Such dogs only are included as were the subject of larceny at common law.

REG. *v.* AVERY.

Larceny — Wife taking husband's goods — Third persons assisting.

The defendants assisted a wife in taking her husband's goods, she intending to leave her husband's house and not to return. There was no evidence that the wife had committed, or intended to commit, adultery, with either of the defendants, nor was it left to the jury to find whether the defendants took the property as principals. *Held*, that a conviction for larceny must be quashed.

Common Bench.

ADAMS *v.* THE ROYAL MAIL STEAM PACKET COMPANY.

Charter party — Time to load.

By a charter party the defendants contracted with the plaintiffs "to load a complete cargo of coals in the customary manner," no time being specified within which the loading was to be done. *Held*, that the loading must be done within a reasonable time. That a strike among the colliers, and a dispute with a railway company, both occurring after the contract was made, would not excuse an unusual delay.

BAXENDALE *v.* THE GREAT WESTERN RAILWAY COMPANY.

Undue preference by railway company.

Under the acts of parliament which require railway companies to afford accommodation on equal and reasonable terms, and give the Court of Common Pleas jurisdiction to prevent their affording undue preference or imposing undue disadvantage, the court will restrain a railway company from making charges calculated to favor its own interests in an independent business. Thus, where the charge had always been 3s. 6d. per ton on goods carried between certain stations, and the company raised the price to 8s. 4d., in order to cover the expense of collecting and delivering the goods, and then advertised that they would collect and deliver free of charge, with a view to monopolize the delivery of goods as well as the carriage, they were restrained.

HOSMER *v.* CORNELIUS.

Master and servant — Permanent incapacity.

A person who represents himself, although not fraudulently, as competent to do certain work, and is hired for a time certain to do such work, may be discharged before the end of the time, if found incompetent.

VALENTE *v.* GIBBS.

Ship-Charter party — "Voyage."

By charter party, defendants hired of plaintiff a ship lying at the port of B, and it was agreed that she should sail from B on or before the 30th of July to C for orders, thence to D to load, &c.; a certain number of days were allowed for loading, and either party might detain the vessel for thirty days more at £7 demurrage per day. "Should the vessel be unnecessarily detained at any other period of the voyage, such detention to be paid by the party delinquent to the party observant at the above-named rate of demurrage or compensation." The vessel was unnecessarily delayed for a long time at B, where she was lying when the charter party was made. *Held*, that the "voyage" did not begin until she had left B, and this clause did not apply.

Exchequer.

WILLIAMS *v.* FITZMAURICE.

Contract — Builder's specification.

Plaintiff agreed "to do and perform all the work of every kind mentioned and contained in the foregoing particulars, according in every respect to the drawing, for £1,100, the house to be completed and dry, and fit for A's occupation by 1st August, 1858." The specification contained very minute details of most of the work, but no mention was made of flooring or flooring boards. *Held*, that the plaintiff was bound to furnish the flooring and flooring boards under the general agreement to complete the house fit for occupation.

METROPOLITAN SALOON OMNIBUS COMPANY *v.* HAWKINS.

Joint stock company — Libel.

A joint stock company registered under 19 and 20 Vict., c. 47, can maintain an action for libel. Nor is it an answer to such action that the defendant is a shareholder.

HARRISON *v.* PEARCE.

Libel — Evidence — Damages.

In an action for libel, the writing being in its nature actionable, evidence of damage accruing to the plaintiff after action brought, is admissible to go to the jury on the question of damages.

Court of Appeal in Chancery.

COPE *v.* DOHERTY.

Merchant shipping act — Application to foreign ships — Collision.

When a collision occurred upon the high seas between two foreign ships, and the Court of Admiralty had decreed damages against the vessel in fault, and a bill on behalf of the owners of that vessel was filed to have the value of the ship and cargo ascertained, and to have the sum divided ratably among the persons damnified, it was *held* that the clause of the merchants shipping act, limiting the amount of damages under such circumstances, did not apply to foreign ships, and a demurrer to the jurisdiction of the court was sustained.

ROLT *v.* HOPKINSON.

Mortgage — Future advances.

A executed a mortgage to B for present and future advances; he afterwards executed a second mortgage to C of like description; each mortgagee had notice of the deed to the other. *Held,* that C's mortgage, to the extent of advances actually made, had priority over subsequent advances made by B.

PRIDE *v.* FOOKS.

Will — "Children" — "Issue."

Testator, by his will, ordered personal property to be accumulated for a certain time, and then to go to the child or children of his nephews and niece, A, B, and C, "one-third thereof to the child or children of A; if but one child, the whole to such only child, but if more than one, then to all such children in equal proportions; and the two remaining third parts thereof to the child or children of B and C in like manner; and in case either of my said nephews or niece shall happen to die without leaving any children or a child lawfully begotten, then I direct that such third part shall go and be paid to the children or child of the other or others leaving children or a child, in equal proportions, if more than one; and, in case all of them, my said nephews and niece, shall happen to die without leaving any issue lawfully begotten," then the whole to go to D, &c. A, B, and C died leaving no children, but one of them left several grandchildren. *Held*, that the word "children" in the first part above cited did not include grandchildren, but that "issue" did include them; that is, that neither the direct devise nor the devise over took effect, but there was an intestacy.

MONYPENNY *v.* MONYPENNY.

Deed — Covenant.

A, on the marriage of his son, gave, granted, bargained, and sold to B, his son's wife, in case she should survive, &c., £300 a year, charged upon certain manors of which he supposed himself seized in fee, and also "covenanted, granted, and agreed," that should the rent charge remain unpaid, B might distrain; and for security he granted, bargained, sold, and devised the manors to trustees for a term. After A's death, it appeared that he had only a life interest in the principal manor. The small portion of which he had owned the fee was sold, and B received the proceeds. *Held*, (by the Lord Chancellor, overruling the decision of Wood, V. C., assisted by Bramwell and Watson, B. B.), that B could proceed against A's personal estate upon the covenants of the deed.

KIRCHNER *v.* VENUS.

Freight — Lien.

Goods were shipped at Liverpool for Sydney to shipper's "order or assigns, he or they paying freight in Liverpool one month after sailing, vessel lost or not lost." *Held*, that the compensation was not, strictly speaking, freight, and that the master had no lien for it against an indorsee for value of the bill of lading. That evidence of the custom of Liverpool was not admissible, without showing knowledge on the part of the indorsee at Sydney.

V. C. Kindersley's Court.

ROBINSON *v.* WOOD.

A testator devised lands in fee, but declared that if the devisee died under twenty-one years of age and without issue, the lands should go over. The devise over was within the mortmain act and void. *Held*, on the authority of *Doe* d. *Bloomfield* v. *Eyre*, 5 C. B. 746, that the prior devise in fee was devested upon the death of the devisee under age and without issue, and was undisposed of by the will.

V. C. Stuart's Court.

RAYNER *v.* HARFORD.

Security — Composition Deed.

B & Co. gave to the plaintiffs, as security for a loan, *a delivery order* signed by one member of the firm of B & Co. upon another member who had the sole charge of their wharfage business, and in whose name it was carried on, for "fifty tons of palm oil out of the first of our ships which shall arrive, whether it be the Glenelg, Arab, Mary Ann Bonford, or Victory." On the following day, B and Co. suspended payment, and their affairs were wound up under the composition clause of the bankrupt act, by a deed signed by the plaintiffs, which contained a provision that no creditor who executed the deed should be prejudiced as to his security. The defendants were the trustees under the deed. The first ship which arrived had only twenty-seven tons of palm oil on board which had belonged to B & Co. at the date of the order. Imme-

diately upon the arrival of this vessel, the plaintiffs notified the defendants of their claim, who refused to acknowledge it, and took the oil.

Held, that the delivery order was a valid security for fifty tons which should first arrive in one or more of the ships named, and that the plaintiffs did not lose this security by signing the composition deed.

Findall *v.* Powell.

Steward — Bill for account.

It is ordinarily the duty of a steward to keep accounts of his transactions on behalf of his principal. But where, from the education of the steward and the course of dealings between him and his principal, it was evident that this duty could not have been required, a bill for an account brought by the personal representative of the principal, was dismissed with costs.

Taylor *v.* Taylor.

Husband trustee for wife — Legacy whether satisfaction.

A married woman had the beneficial title to certain personal property, which was in the hands of a trustee. By consent the trustee transferred the property to the husband, who agreed to act as trustee, and pay the income to his wife. By will the husband left the wife a much larger sum than the whole amount of the trust property. *Held*, that the legacy was not a satisfaction of the debt.

V. C. Wood's Court.

Ewens *v.* Addison.

Legacy — Consent by acting executor.

Testator gave his daughter a legacy to be paid to her by his executors, if she should marry with their consent. One executor renounced, and the daughter married with the consent of the continuing executor. *Held*, that the consent of the executor who renounced was not necessary to entitle her to the legacy. The report of *Graydon* v. *Hicks*, 2 Alk. 16, remarked upon.

Re Powell's Trust.

Will — Ready money.

Testatrix being possessed of cash in the house, a balance at a savings bank due on demand, and money secured by two promissory notes payable on demand, bequeathed "all my ready money" to A, B and C. *Held*, that the cash in the house, and the balance at the bank, passed by this bequest, but not the money secured by the notes.

Charton *v.* Douglas.

Partnership — Goodwill, whether it includes firm name.

J. D. and his partners carried on business under the firm of J. D. & Co. J. D. sold all his interest in the copartnership and in the goodwill of the business to his partners, and soon after set up a precisely similar business next door to his former partners, and proposed to carry it on under the firm of "J. D. & Co." *Held*, that although there was no covenant in the agreement of dissolution against J. D.'s carrying on a similar trade, yet he could not adopt the name of the old firm.

Admiralty Court.

The William.

Ship — Master and sole owner — Wages.

Where the master of a ship, who was sole owner, gave a bottomry bond on ship and freight, pledging his personal credit as well as that of the ship, and afterwards navigated her as master, *held* that he could not assert a claim for wages as master as prior to that of the bondholder.

The Indomitable.

Bottomry bond.

To make an instrument valid and cognizable in the Court of Admiralty as a bottomry bond, it must appear that the money was advanced upon a maritime risk.

Whether the mere fact that there was to be insurance for the benefit of the lenders, and at the expense of the borrowers, would invalidate the contract as a bottomry bond, *quære.*

Court of Probate.

IN THE GOODS OF JOSEPH RAINE.

Joint will.

A & B, partners in a farming business, and joint tenants in a certain freehold, made a joint will, disposing of their property. On the death of A, probate upon his will was refused, the court considering that the will could not take effect until the death of both.

IN THE GOODS OF ELIZABETH MERRITT.

Will under a power — Reservation.

A married woman duly made a will in execution of a power, disposing of certain stock held under her marriage settlement, and appointed executors thereof. Many years after, she made another will, disposing of certain other property held under her marriage settlement, not referring to the former will nor to the stock thereby disposed of. The second will contained a general clause revoking all former wills. *Held*, that the former will, under the power, was not thereby revoked.

Divorce and Matrimonial Causes Court.

WEBER *v.* WEBER.

Alimony and costs pendente lite.

Where the husband petitioned for dissolution of marriage on the ground of the wife's adultery, the court allowed the wife's costs to be taxed from time to time against the husband *pendente lite.*

Alimony was also granted, *pendente lite*, at the rate which the husband had allowed under a deed of separation, and which he had paid up to the time at which he alleged that he had obtained evidence of her adultery.

KEATS *v.* KEATS.

Condonation.

Condonation means something more than forgiveness; it includes renewed or continued conjugal intercourse.

United States Court of Claims.

THOMAS C. NYE *v.* THE UNITED STATES.

Usage — Post-office regulation.

SCARBURGH, J. — The petitioner alleges that, under his contracts with the United States, he found it necessary to invest a large amount of capital in horses, post-coaches, &c., and that from the year 1841 up to 1845, he "owned and employed in such service constantly about two hundred horses and a large number of post-coaches."

The 13th note to the proposals for carrying the mail, from the 1st day of July, A. D., 1841, till the 30th day of June, A. D. 1845, both days inclusive, is as follows: "On coach routes where the present contractor shall be superseded by an underbidder who may not have the stage property requisite for the performance of the contract, he shall purchase from the present contractor such of his coaches, teams, and harness, belonging to the route, as shall be needed, and may be suitable for the service, at a fair valuation, and make payment therefor by reasonable instalments, as his pay becomes due, unless the present contractor shall continue to run stages on the route, &c. This note is treated by the petitioner as a regulation of the Post Office Department. The postmaster general, in his annual report of December 1st, A. D. 1845, and in his letter to the mail contractors appended to that report, speaks of it as a regulation of his Department. See 1 Vol. Ex. Doc., 1 Sess., 29th Cong., pp. 852, 876. The present postmaster general, in his letter of the 29th day of January, A. D. 1857, says: "It was a regulation or *requirement* of the Department." And the present second assistant postmaster general, in his letter of the 8th day of July, A. D. 1856, speaks of it as a regulation of the Department, and says that it is correctly quoted in the petition.

By the act of congress approved March 3, A. D. 1845, it was provided, "that it shall be the duty of the postmaster general, in all future lettings of contracts for the transportation of the mail, to let the same, in every case, to the lowest bidder, tendering sufficient guaranties for faithful performance without other reference to the mode of such transportation than may be necessary to provide for the due celerity, certainty, and security of such transportation; nor shall any new contractor hereafter be required to pur-

chase out, or take at a valuation, the stock or vehicles of any previous contractor for the same route." 5 Sts. at L., p. 738, ch. 43, § 18.

In the month of December, A. D. 1844, the postmaster general advertised for proposals for carrying the mails on the routes above mentioned for the term of four years from the first day of July, A. D. 1845; and in his advertisements was inserted the 13th note already noticed; but on the 8th day of March, A. D. 1845, he issued a circular, in which he called the attention of persons desiring to contract, to the provisions of the act of March 3, A. D. 1845, and gave notice that no new contractor would be required to purchase out, or take at a valuation, the stock or vehicles of the previous contractor for the same route.

The petitioner alleges that in the letting of the mail contracts in the year 1845, on the respective routes and lines on which he was a contractor previous and up to the letting, he was an unsuccessful bidder, and lost all his contracts for transporting the mails thereon; that the new contractors not being required to purchase out, or take at a valuation his stock and vehicles, the whole thereof was left on his hands without any employment or use for the same; that the failure of the postmaster general to require the new contractors to purchase out, or take at a valuation his stock and vehicles, was a direct violation of his contracts with the United States; and that he has thereby sustained heavy damages.

The principal inquiry presented for our consideration in this case is, Has the petitioner shown a contract, either express or implied, with the United States, by which they undertook that if he should be succeeded by an underbidder, the latter should be required to purchase his stock and vehicles; or, in other words, that such underbidder should be required to comply with the 13th note?

In determining this question it is necessary to understand the true character of the 13th note, and the purpose for which it was used. It is called, as we have seen, a regulation of the Post Office Department. How and in what sense it was a regulation of that Department, is shown by the letter of the postmaster general to the mail contractors appended to his annual report of December 1, A. D. 1845, and in the letter to the postmaster general of the 29th day of January, A. D. 1857. In the former he says: "The condition

requiring a new contractor to take the property of a prior one was a regulation of the Department attached to the advertisement, and not exacted by any law, and can have no bearing upon any other contract than the one made under it." In the latter he says: "I beg leave to say that the 'regulation' 13, therein quoted, was, as stated by the petitioner, one of the 'notes' attached to the advertisement inviting proposals for carrying the mail in New York from 1841 to 1845, and had been in use for many years in all the advertisements for mail letting throughout the Union, until the passage of the act of congress of March 3, 1845." From these statements we infer that whenever advertisements were issued inviting proposals for carrying the mail on coach routes, the 13th note, by order of the department, constituted a part of them; and that it was not designed to bear on any other contracts than those made under such advertisements. There was no act of congress, and no regulation of the Department requiring the 13th note to be inserted in *all* such advertisements. When the period at which advertisements were to be issued arrived, whether it should be inserted in them or not was a matter resting entirely in the discretion of the postmaster general for the time being. It was called a regulation merely because it was the creature of the department. A compliance with it by an underbidder was imposed as a condition precedent to the acceptance by the United States of his proposals. That was its whole object; and when that object was accomplished, the 13th note had performed its office in reference to the particular contract to which it applied.

Such is our understanding of the true character and purpose of the 13th note. So considering it, it seems to us that in its very nature it was applicable only to the proposals of underbidders, made under the particular advertisements to which it was annexed; and that the mere fact that it had been over and over again, at many successive lettings, inserted in the advertisements and made a condition precedent to the acceptance of the proposals of underbidders, created no obligation whatever on the part of the United States to use it in subsequent advertisements.

Each particular contract for carrying the mail is, under the acts of congress, a special contract, and the mutual rights and obligations of the parties are to be found in the contract itself. The mere fact that the advertisements in-

viting proposals for such contracts have for a series of lettings contained a particular provision, cannot constitute a usage. The whole business connected with each contract for carrying the mail was matter of special arrangement, and all its details were expressly, item by item, declared and agreed upon; and each contract was a separate, distinct, and independent transaction. If a special contract be made, to continue for a limited period, and it be renewed again and again, no matter how often — if on each occasion the same formalities are observed as at the beginning, and a special contract is made — there would be no more obligation to make it the hundredth time, after it had been made ninety and nine times, than there was to make it the second time, after it had been made once. The mere repetition of a special contract, no matter how often, cannot create a usage.

We do not mean to say that a special contract cannot be affected by usage. The language of such a contract may be interpreted by usage; and *incidents* may be annexed to it by usage. Usage is admissible to show the meaning of the words "cotton in bales." (*Taylor* v. *Briggs*, 2 C. & P., 525;) and a lessee by deed may show that, by the custom of the country, he is entitled to an away-going crop, though no such right is reserved in the deed. *Wigglesworth* v. *Dallison*, 1 Doug. R., 201; *Dorsey* v. *Eagle*, 7 Harr. & Gill, 321; *Stultz* v. *Dickey*, 5 Binn., 285; *Carson* v. *Blaze*, 2 ibid., 487; *Van Ness* v. *Pacard*, 2 Peters' R., 137; *Hutton* v. *Warren*, 1 Mees. & W., 466. This is allowed upon the presumption that the parties did not intend to express in writing the whole of the contract, but to make the contract with reference to the usage. *Hutton* v. *Warren*, 1 Mees. & W., 475; *Boorman* v. *Johnston*, 12 Wend. R., 574. The rule, it is said, does not add new terms to the contract, but it shows the full extent and meaning of those which are contained in the instrument. 1 Greenlf. on Ev., § 294.

And so, where negotiable paper is payable with grace, parol evidence of the known and established usage of the bank at which it is payable is admissible to show on what day the grace expired. *Renner* v. *Bank of Columbia*, 9 Wheat. R., 581. Evidence of usage is received for the purpose of ascertaining the sense and understanding of parties in contracts made with reference to such usage; for the usage then becomes a part of the contract; and may not

improperly be considered the law of the contract; and it rests upon the same principle as the doctrine of the *lex loci.* Per Thompson, J., in ibid., 588.

But in all these cases the usage existed independently of the contracts, and was by implication made a part of them, because they were made with reference to it. The contracts did not create the usage, but the usage showed that the contracts so made had the meaning which the usage attached to them. There is nothing of this sort connected with the contracts in question.

We are of the opinion that the petitioner is not entitled to relief.

SELECTIONS FROM THE CHARGES, AND OTHER DETACHED PAPERS, OF BARON ALDERSON; WITH AN INTRODUCTORY NOTICE OF HIS LIFE. By CHARLES ALDERSON, M.A., Fellow of All Souls, Oxford. T. W. Parker: 1858.*

In the beginning of the year 1857 Baron Alderson was removed by death from the prominent position he had long occupied in Westminster Hall, the active business of the world, and the society of no inconsiderable a group of warm friends and attached relatives. His natural endowments, and successful career in his profession, were such as to render it very fitting that the main facts of his life, and the peculiar features of his character, should be given to the world from the hands best able to record them. It is, therefore, with pleasure that we have seen published the small volume before us, which has, amongst other merits, that of being neither written with undue prolixity, nor filled with detail of no general interest — faults by far too common in biographies of the present day.

Edward Hall Alderson was born at Yarmouth, on September 11th, 1787. His father was Recorder of Norwich, Yarmouth, and Ipswich, and lived to enjoy the pleasure of seeing his son Judge of Assize on the Norfolk circuit. Although the family seems to have had at this period close connection with the eastern counties, yet it sprung in earlier times from the north, on the borders of Yorkshire and Westmoreland — a circumstance of no small value in after years to the young barrister, when he joined the northern circuit.

The future judge seems from his early youth to have exhibited excellent talents, evinced first in his school career, and afterwards in his university triumphs. He was entered at the proper age at Charterhouse; but, as London air evidently injured his health, he was soon removed thence to the grammar school at Bury St. Edmunds, where he found several comrades, who were subsequently his companions or competitors in the race of life. Amongst the former was the late Bishop Blomfield, with whom he preserved a friendship till death parted them.

With a view of being prepared for Cambridge, young Alderson was next committed to the care of Mr. Maltby, (afterwards Bishop of Durham) under whose able guidance he remained for the next fifteen months. That this was a happy selection of a tutor seems pretty clear from the fact

* From the London Law Magazine and Review.

that from within the circle of Mr. Maltby's pupils, at one time, sprang a Senior and Second Wrangler, two Chancellor's Medalists, and two Smith's Prizemen — a rare exhibition of successful training by one master.

In 1805 the well-disciplined pupil was enrolled as a member of Caius College. "If any one," he afterwards was heard to declare, "had offered me, when going to college, the place of *Second* Wrangler, I would have at once refused" — so confident was he then (as, indeed, he seems to us to have been through life) of his own powers, and of his right to eminence. The result justified his own and his friends' expectations. In January, 1809, Alderson was declared Senior Wrangler, and afterwards first Smith's Prizeman. Ambitious for equal classical distinction, he entered forthwith upon the struggle for the first medal, and obtained it — thus, with a single exception from his own college, which occurred thirty-six years before, achieving university honors unknown to have been reaped by one man.*

In the course of the same year the triumphant University man arrived in the Temple to test his powers in a new sphere, where many a lofty college reputation has not been sustained. He there commenced reading in the chambers of Mr. Chitty. In 1811 he was called to the bar, and joined the Northern circuit and Yorkshire sessions. The interest which one feels in reading the familiar names of those with whom Alderson now consorted is not unmingled with a feeling of mournfulness at the havoc which time has caused among them. The northern circuit, indeed, at the time he joined it, contained a brilliant group, whose fame will survive for many generations. Among the first which meets our eyes is that of "the famous Mr. Brougham," who, it appears, was one of the first to welcome the new junior. "I am," writes the young barrister from circuit, "going to spend a few days at Brougham Castle — the house of the great Mr. Brougham's father. This invitation was unexpected by me; but, as you may suppose, I am not a little gratified that my acquaintance should be sought by so distinguished a man. . . . I like our sessions leader, John Williams, very much. What business he is in! and certainly most deservedly. In a few years he must, I think, lead the circuit. Scarlett is the great man here — he has by far the most business, and when, as is expected, he gets a silk gown, he will annoy either Park or Topping a good deal. Allan Park has been very civil to me."

Again, in a letter to his sister, he says, "I have been staying, since I last wrote to you, with Mr. Brougham, at his seat in Westmoreland, where I spent a week in the pleasantest manner possible. The family is extremely amiable, seeming completely to love one another, and looking up to their eldest brother as to a superior man, as, indeed, he is. . . . . I think you had the impertinence to ask how I came to be acquainted with Brougham. Answer it yourself, madam; I cannot for modesty's sake. To be serious, however, he sought my acquaintance; as, although I was, from the first, extremely desirous of knowing him, I scorn to court any man whom I consider my superior."

There was, in point of fact, no good cause for astonishment in Mr. Brougham taking occasion to make acquaintance with the young Senior Wrangler, who, besides having given palpable evidence of his high attainments in science and literature, was an agreeable and witty companion,

* Lord Lyndhurst was Second Wrangler and Second Smith's Prizeman, 1794; Pollock, C.B., First Wrangler and First Smith's Prizeman, 1806; Lord Langdale the same, 1808; Maule, J., the same, 1810. In later times there was one whose career was prematurely closed by death, just when the profession discovered that there was a genius of high order among its members — we mean Mr. Goulburn — whose university honors were, perhaps, considering the higher demands made in later times upon students, really, though not nominally, equal to Alderson's. Mr. Goulburn was Second Wrangler and Second Smith's Prizeman, and he also took the first honor in classics, being first in the classical tripos, and senior medalist.

and one fit to enjoy the society and friendship of the eminent inhabitant of Brougham Castle. Indeed, this place (to which future generations will make pilgrimages, as to a shrine hallowed by having been the abode of the great genius of the present time) has often received the fortunate possessor of great talents, which have been here recognized before the world has been able to descry or willing to acknowledge them. And here, too, many a leading as well as rising spirit of the day has enjoyed, and happily can still enjoy, the privilege of holding intercourse with a kindred genius, whilst receiving his generous and unaffected hospitality.

Fortunately for the young counsel he was not utterly without professional connection to begin with. He informs his sister, in 1812, that in Michaelmas term he made two and a half guineas, in Hilary five, and in Easter six guineas. In Trinity he had nine motions, "owing to *two* new clients, for I have not had my average from my *one* old one." Neither was he destitute of support at sessions and on circuit, and he thus had the advantage of showing the world at once that he was there really for business, and could do it if it was offered him. He certainly improved these opportunities, and rose accordingly. Still he was not, however, quite satisfied with the rapidity of his progress.

In a humorous ode to "Adversity," written at the time, he affirms he could gladly dispense with all her "sweet uses," and exclaims, —

> "But *stead* of Thee let bus'ness come,
> Attended by the ceaseless hum
> Of motions, briefs, appeals!
> How sweet her voice, how fair her mien!
> While in perspective dim are seen
> King's counsel and the seals!"

During the next five years of his professional career Alderson appears to have continued in the course of prosperity, though we have no particulars afforded us to judge by. In 1817 he undertook to report with Mr. Barnwell, and the five volumes of "Barnwell and Alderson" were the result, in which stand recorded many of the great judgments of Ellenborough, Bayley, Abbott and Holroyd. After another space of five years Mr. Alderson was a "successful lawyer," in large business, both on circuit and at Westminster; and, thereupon, in 1823 he married Miss Georgina Drewe. In 1825 we find, also, that his mathematical and scientific acquirements stood him in good stead, in introducing him as counsel to the opponents of the Manchester and Liverpool Railway on the parliamentary committee, when he had to examine George Stephenson. He contended before the committee on this occasion, and satisfied them, it will be remembered, that a train of forty tons weight could not travel on the rails at the rate of twelve miles an hour; and that, in going round a curve, though the engine might possibly follow the turn, yet the trucks and carriages coming after it would, shooting straight on, infallibly pass off the road!

Although it would not have been unnatural for Alderson now to have turned his attention to politics and parliament, yet warned, perhaps, by the premature death of his connection, Lord Giffard, who had purchased high rank at the cost of a broken constitution, he judged, and probably wisely, that the chance of his health breaking down by excess of labor, and the lottery of gaining his object through party successes, were not to be preferred to a puisne judgeship, which he had certainly a right to expect he might ere long obtain.

During the next five years (from 1825 to 1830) Alderson's position in the circuit was simply that of waiting for the departure of the three or four great leaders, when he would have immediately assumed the lead. As he expressed it, he was "heir-apparent to the crown, upon the depar-

ture of the present holders." He generally appeared as second counsel in the most important causes; but he himself not unfrequently, at Lancaster and other places, though not having silk, led on one side or the other. Indeed, he never arrived at the honor of King's Counsel; for, whilst on the eve of possessing this coveted honor, he was raised to the bench.

In November, 1830, he took his seat in the Court of Common Pleas — a young judge, being only forty-three years of age. At the time of this appointment he gave a pledge to Lord Lyndhurst that if it should be found desirable to transfer him to the Exchequer he would consent to the change. He sat on the equity side of the Court of Exchequer till 1841. The valuable reports of Young and Collier, embodying his excellent judgments during the time, are sufficient evidence both of his learning and success as a judge. We gather from the sketch of his life, given in the volume mentioned (p. 62) at the head of this article, that both he and his friends considered that, for his eminent services, whilst performing the "double duties" of equity and common law judge, he ought to have received some substantial acknowledgment from the government. Unless, however, he had been made chief of his court, when the opportunity arose, we do not well see how any appropriate reward could have been offered him. The promotion of a puisne judge to the chiefship was possible, and such a step might, we think, be often taken with advantage, although, doubtless, there are weighty reasons to be advanced to show the unadvisableness of such practice. We heartily agree that no judge was more zealous than was Baron Alderson, at all times, in performing his judicial duties, but special grounds and opportunities for granting him extraordinary rewards for his service are not so obvious to our minds.

Before we pursue the judicial history of this late excellent judge, we may pause one moment to look back on his career as an advocate. He lived with and was matched against legal giants. Brougham and Scarlett, Pollock and Wilde, Parke, Patteson, and Cresswell, were men who, in any day, would have been dangerous competitors. Besides these there were others, also, who, though their names are not so well known or remembered by the present generation of lawyers, were, nevertheless, doughty antagonists. To have made for himself a footing, and held his ground — to have gained and kept the field in the contests which belonged to such times and antagonists — argues remarkable legal powers in the leading junior of the northern circuit. His best qualities in court, perhaps, were what we may term *adroitness* and extreme rapidity; the latter, indeed, sometimes as dangerous to himself as to his adversary. To the highest class of eloquence he had no claim; but to earnest, vigorous, and plausible management of his own case, as well as for watchful activity, unflinching courage, and ready wit in carrying on the war against his enemy, he had a deserved reputation.

His were the days, too, of nice distinctions in pleading, of much technical science, and multifarious and artificial forms. Slight slips might be made, fatal to yourself or your adversary. To cover your own flaws, and discover your enemy's, exhausted all the resources of legal subtlety. It is true this kind of practice produced the evil of engendering too much sharpness; but, at the same time, it caused the accomplished advocate to cultivate an acuteness, precision, accuracy, and minute erudition, which such a well-trained intellect as Alderson's possessed in an eminent degree.

For twenty years, then, during the interval of his university success till he reached the bench, did this able lawyer pursue the path which, after all, is the happiest part of a man's journey through life — that of conscious and continued progress. By his talents and his labor he gained step after step. He could always look down with satisfaction on those he had sur-

mounted, and upwards with confident hope to those he designed to reach. Believing that he ought to gain high rank in his profession, every year justified this belief, and crowned his hopes. He did easily and rapidly that which many do slowly, with difficulty, amid various drawbacks, and after repeated disappointments; and, if he sometimes may have thought that had he been more ambitious, and stood out as a candidate for higher honors, his talents might have secured them, too, he must also have had frequent cause for seeing the greater risk to his own comfort which he would have incurred, the greater chances of failure he would have met, and, after all, perhaps the doubtful enjoyment of such honors which he might have obtained. Looking, indeed, at his eminent competitors and successors, it seems to us at least obvious that his choice was right — and, further, that the position he elected to occupy was that which he was best caculated to fill, both for his own advantage and the public welfare. We do not mean to say that there is not a difference of opinion as to the judicial qualities of Baron Alderson. He was apt, it is said, to take capriciously a strong view of a case, and this at too early a stage of its history, and was not willing to alter his view at a riper period. His rapidity of rushing to conclusions, and the pleasure he had in arriving at them before any one else; the confidence he retained in them when thus impatiently formed; his tendency to make refined distinctions, and observe technical subtleties, on some occasions; on others, his disposition to view a case, independently of precedent, by the light of "common sense," and on its own apparently intrinsic merits — these we have often heard urged as reasons why Baron Alderson's judicial character could not be classed in the first rank.

To some extent we think these charges are true. But what a balance of qualities is required to make a "perfect judge!" Bacon, in his well-known essay "Of Judicature," amongst essential attributes which he enumerates, says — "Patience and gravity of hearing is an essential part of justice; and an overspeaking judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the bar, or to show quickness of conceit in cutting off evidence or counsel too short, or to prevent information by questions, though pertinent. The parts of a judge in hearing are four — to direct the evidence; to moderate length, repetition, or impertinency of speech; to recapitulate, select and collate the material points of that which hath been said; and to give the rule or sentence. Whatsoever is above these is too much, and proceedeth either of glory and willingness of speech, or of impatience to hear, or of shortness of memory, or of a want of a stayed and equal attention." A peculiar nervous organization in Baron Alderson, and perhaps the frequent occasions, from his boyhood upwards, when his quickness of wit and his mental superiority had been proved, induced, at times, an impatience and an appearance of self-sufficiency in his demeanor. It was chiefly if not entirely the former quality, we believe, which prevented his assuming his position as one of the most eminent of modern judges. But this defect we allude to is a grave one on the bench; for we should remember that it is no adequate answer to the charge of impatience in a judge to say that, in by far the greater number of cases, he was intolerant of what was superfluous and impertinent only. If, in a small proportion of causes, injustice is done by reason of the truth having appeared *prima facie* on one side, though it was actually on the other, a grievous wound is inflicted, and an impression raised injurious to the character of the judicature of the country.

Soon after his experience as a judge had begun, we find him writing, March, 1833 — "I find I try causes very quickly, and yet I hope satisfac-

torily also; at least I am sure the juries think so: for with them I am a popular judge, as I always endeavor to bring the case to the real point, and always leave that point to them to determine, so that they trust me, as I do n't at all infringe on their real privileges and rights. This is the secret of getting on fast; viz., discarding all the fudge and nonsense of the case, and coming to the real point." And this is so beyond all doubt; the difficulty being, however, always to distinguish between them, and not to discard "real" points in the desire to eliminate "fudge and nonsense." "Affected despatch," it has been said by a high authority, "is one of the most dangerous things to business that can be;" whilst "true despatch is a rich thing; for time is the measure of business, as money is of wares, and business is bought at a dear hand when there is small despatch."

We are not quite sure that Baron Alderson was so harmonious with juries as he seems to suppose in the above letter. Strange mutterings, we trow, were sometimes heard, more or less distinctly, emanating from the bench where the learned Baron presided, which were not altogether complimentary to the jury; and sometimes it went beyond muttering. Take for example the following scene, after a verdict returned in the criminal court, which ran counter to the judge's opinion: — (*Judex loquitur,*) "Good God, Mr. —— (the officer at the assize,) can 't I have *another* jury, and let *these* twelve persons go into the other court, where they can 't do so much mischief?" Then, addressing the "twelve persons," the judge continued — "Gentlemen, you will find in the other court, perhaps, in the course of the day, something you *can* try." Next turning to the bar, but appearing to soliloquize — "No doubt there are some men who never can comprehend what 'evidence' is; but that *twelve* such should come *together* to-day, and let that man off!" Aloud, to the prisoner in the dock — "Prisoner, the jury have acquitted you! Heaven knows why! No one else in the whole court could have the slightest doubt of your guilt, which is of the grossest kind; but you are acquitted, and I can 't help it." There was something in a scene like this rather comical, which was augmented by the eccentricity of manner which the learned judge sometimes exhibited in a very marked manner; but, at the same time, it evinced a righteous indignation at what the judge felt to be an iniquitous verdict.

It was not an uncommon opinion — we do not say it was a just one — that, during a part of the period whilst Baron Alderson sat in the Exchequer, the court "ran riot." Possibly the learned and, it may be, querulous counsel who, practising in that court, may have thus complained, meant that the course of arguments were so interrupted by objections and interjection, hypothetical cases, curious parallels, running comment, partial *dicta* and *contradicta*, keen thrusts in law, agile parries in equity, quick repartees in either, pointed questions and promiscuous conversations, that some irritable advocates might perhaps conclude that every point of law connected with the case was fully — nay, wittily and brilliantly — dealt with, *except* that which was properly involved therein. Indeed, some have been heard to generalize too rapidly, and affirm that a very clever court is a hard one to get a hearing in. Whether this at any time, or to any extent, has been true of the respected court we are referring to, it is not our intention here to inquire. All acquainted with the course of modern law would, however, agree on two points: first, that, during the last quarter of a century, some of the most important and leading decisions have issued from the Court of Exchequer; and next, that Baron Alderson exerted no small influence over the court whilst a member of it.

If we were to express our own opinion of Baron Alderson's judicial powers, we should say he was an *unequal* judge. His wit, which was

sometimes brilliant, at other times degenerated into very poor and rather old jokes — such alone as judges occasionally, with reference to the bar and other court company, or as rich old relations in the presence of expectant heirs, can perpetrate with the chance of raising a smile.

He was, however, a man peculiar both in mental constitution and personal manner; and, viewed only in his public life, his real character may have been, and we think often was, misjudged. Indeed, it is said, probably with great truth, that he was best known and appreciated in the relations of home; and the writer of the biographical sketch before us refers (with some ambiguity of language) to the "hidden side" of his inner nature, "over which, moreover, its own complexity in certain particulars may have thrown a certain amount of disguise."

"The union," continues the passage, "in the same person, of conflicting tendencies — feelings which are more or less veiled from the recognition of the world — remain through life an enigma to many. It was impossible for those who knew him best not to be conscious that much of his deeper nature, and many of his most endearing qualities, were thus liable to be hidden from superficial observers. There were certain points, in respect of which it might perhaps be justly said that the character of which this narrative treats exhibited a succession of remarkable contrasts. There was a disinclination to change, and a clinging to the associations of the past, which might induce the notion that he was by inclination ultra-conservative, and ill-affected towards rational improvement at the price of change; and yet instances might be cited on questions of social, political, and religious interest, in which the capacity of his mind to adapt itself to the requirements of the day was unmistakeably evinced. He could retain to the close of life the same engaging simplicity of nature, without impairing, on the other hand, his usefulness as a practical man of the world. Where he deemed it a duty, he could bring his mind to the posture of the most childlike faith, without ceasing to be, in other matters, an acute and close reasoner. It might appear surprising, too, that, to a temper of mind essentially serious, he should have united the keen sense of the ludicious, and uncontrollable love of fun, by which he will possibly be remembered when other and higher claims to recollection are forgotten; or that, while apparently yielding somewhat to a constitutional indolence of disposition, he should yet have cultivated the habit of incessant intellectual employment; often most engaged in thought when, to all appearance, least occupied. But, apart from the points of antagonism, there were others, also, in which his character was liable to be misinterpreted. The warmth of heart and depth of feeling, which were veiled under a manner too inartificial to be always understood, were fully known to those only to whom circumstances were permitted, from time to time, to reveal them. Many with whom he mingled in society, and who have seen and judged of him from without, were backward to guess the strong sympathy which bound him to his fellow-men; and more than once has an erroneous impression been removed by the chance discovery of some act of kindness or timely countenance — some little evidence of feeling or word of encouragement, when encouragement was precious — something, in a word, which disclosed what lay beneath the surface, and opened to view a heart which emphatically could sympathize with the joys and sorrows of others. And, if the kindliness of his feeling was liable to pass unrecognized, his expression of his views and opinions, from its very earnestness and freedom, was open to misconception of another kind. In talking on a matter which interested him, he was not careful so much to pick and choose his words as to give free vent to the current of his thoughts, *liberare animam*. Even to a discussion of comparative indifference his kindling manner and emphatic

tones often imparted an appearance of warmth which the subject might hardly seem, to one who knew him less intimately, to warrant.

"It will not be out of place to draw attention, before concluding, to a few of the most distinctive points in his purely mental powers. It was said by one of his earliest and most eminent companions, both on the Northern Circuit and the Bench, that he was an extraordinary instance of an acute and vigorous understanding, united to great powers of reasoning, and great wit. Perhaps the most marked feature, however, of his intellect was, not so much either its power to grapple with difficulties, or the logical ability which it possessed, and of which many of his legal judgments afford proof, as the singularly rapid and intuitive manner in which his powers of reasoning, and, indeed, of comprehension generally, were exercised. A hint or two, picked up here and there, often sufficed to enable him to spring upon the meaning of the whole; he had often, to a great extent, mastered the details of a subject where ordinary minds would have probably only apprehended its outline. To this intuitive sagacity he owed not only in great part his professional success, but also the enviable ease with which he accomplished mental work of all kinds, however uninviting."

To that quality of his mind which enabled him to seize the facts and their meaning rapidly, we have already adverted; the other point just referred to, namely, the existence of strong *contrasts* in his nature, was undoubtedly one which was very remarkable. It gave rise to what we may perhaps call a grotesqueness in his character, which puzzled many observers. Thus he frequently, both on the bench and elsewhere, employed language and phrases of a description more often, and perhaps more appropriately, used in chapels or churches on solemn occasions, and we have seen him astonish the court by an address to a prisoner, which the chaplain of the jail might have borrowed with advantage for a sermon. On other occasions, and in other society, however, he would produce, from his stores of anecdote or laboratory of jests, specimens of facetiæ which would assuredly have confounded those who had known him in only his more serious moods.

Connected with this grotesqueness of nature was the practice, to which he sometimes gave way, of seeing or "making" fun, when it would have been more decorous not to have been jocular. This generally resolved itself into verbal wit. The "laughter" which occasionally was thus raised in court was felt by many to be unseemly, as, indeed, it always is when, the choice being between a decent dignity or funniness, the latter is elected because of the temporary pleasures or popularity it confers. There have been and still are other instances, showing that to keep up the reputation of a wit upon the bench is a dangerous attempt.

Baron Alderson, it will be remembered, was much interested in religious and theological questions. His letters to the Bishops of Exeter and London, and one to a clerical friend who contemplated entering the Romish church, show how strongly he felt on these matters, and exhibit the line he took when the litigious religions of Mr. Gorham and the Bishop of Exeter were inducing them and their partisans to make holy and noisy wars against each other. The letters in question are very characteristic in style, and of more than usual excellence, and we are glad that they have been preserved among the other detached papers printed at the end of the volume before us.

His poetical powers were not so generally known as his theological predilections; nevertheless, several of the specimens of the translations and imitations evince real grace and most scholar-like feeling. To the last he maintained his love of the classics, and, during his vacations, seems to have fallen back upon his early pursuits with the freshness and avidity of his

youth. The enjoyment, indeed, of these well-earned vacations, as narrated by his son, presents a most pleasing picture to the reader's mind. Happy in his family and with his intimate friends, rich in his own intellectual resources, and possessed of a genuine love of nature, he seems to have been equally delighted, whether in retirement at Lowestoft he stood watching from the garden the busy craft sailing by, or conned anew his favorite volumes, or boated in his chosen companionship along the Norfolk coast, or rushed forth on an unpremeditated and rapid excursion to the opposite shores, and explored a strip of the neighboring continent. One may see with what buoyant joy he anticipated his annual holiday, in the following stanzas: —

My holidays, my holidays!
'T is over, and now I am free
From the sharp attorney's tricky ways,
And the clerk's chicanery;
And the subtle draughtsman's tangled maze,
As he weaves the vacation plea.

My holidays, my holidays!
Now cometh the tranquil night,
And the twilight walk, and the upward gaze
At those distant orbs so bright;
While the swelling wave 'mid the pebbles plays,
And breaks with a gleam of light.

My holidays, my holidays!
O, will the time e'er come,
When, freed from this world and its weary ways,
And its trifles light as the foam,
'Midst welcomes of joy and songs of praise,
I may reach my real home?

He reached his "real home" after a brief illness, from an affection of his ever-active, perhaps over-wrought, brain. He had, it is true, approached the verge of threescore years and ten; but had remained apparently vigorous in body, and active in mind, within three weeks of his death.

He closed his useful, and we must believe happy, life, as a good man might well desire — in tranquillity and peace — surrounded by those most dear to him, and who loved him best because they knew him best.

INTELLIGENCE AND MISCELLANY.

Medical Testimony. — The initials signed to the leading article will suggest, and rightly, to many of our readers, the name of a physician of the highest distinction in the treatment of the insane. It may be regarded as an able plea for a relaxation of the strictness sometimes insisted on in the mode of eliciting information in medical matters, rather than as a discussion of the precise state of the law upon that subject; and in this view it is of much value.

New Courts in Massachusetts.

Supreme Judicial Court of the Commonwealth.

Special Session, Saturday, July 2, 1859.

Before the court was opened, the chief justice announced that this session was to be held under the power given in section 53 of the act establishing the Superior Court, and in order to open the court of the Commonwealth for the receiving of exceptions, &c., from the Superior Court. The clerk then read the following order:

COMMONWEALTH OF MASSACHUSETTS.

At Boston, on the 2d day of July, in the year of our Lord one thousand eight hundred and fifty-nine.

Whereas, an act was passed at the last session of the General Court of this Commonwealth, entitled "An act establishing the Superior Court," by which various changes and alterations are made in times and places of holding terms of the Supreme Judicial Court, and in the arrangement of actions and proceedings therein;

And whereas, it is provided, amongst other things, that a law term of the Supreme Judicial Court shall be held at Boston, on the first Wednesday of January in each year, and all questions of law, whether arising upon appeal, exception or otherwise, and from whichever court, shall be therein entered and determined, if the same arise in either of the counties of Essex, Suffolk, Middlesex, Norfolk, Plymouth, Bristol, Barnstable, Dukes County or Nantucket, and all questions of law in criminal cases arising in all the counties of the Commonwealth, and for other purposes;

And whereas, it is further provided by the said act, that the Supreme Judicial Court may hold a special session of said court of the Commonwealth at such time before the first day of January next as the justices thereof may think expedient, for hearing such questions as may come before them by virtue of said act;

And whereas, it is further provided by said act that the clerk of the Supreme Judicial Court for the County of Suffolk shall act as clerk of the said court for the Commonwealth until his successor is elected and qualified, and that the said act should take effect from and after the first day of July next:

Now, therefore, the undersigned, judges of the Supreme Judicial Court, being of opinion that it is expedient that a term of the said court for the Commonwealth, should be held before the first day of January next, do hereby order and direct that a term of said court for the Commonwealth shall be held at the Court House in Boston, on this day, Saturday, the second day of July, A. D. 1859, at 10 o'clock in the forenoon, for all the purposes contemplated and provided for in said act, and that George C. Wilde, Esq., now clerk of the Supreme Judicial Court for the County of Suffolk, be and he hereby is required to attend at the time and place above named, to act as clerk of said court for the Commonwealth and record their proceedings, and to perform all other duties incident to the office of clerk of said court, both in court and in the clerk's office of said court, to be opened and kept for the purposes contemplated by said recited act until a clerk of said court shall be appointed according to the provisions thereof.

(Signed by all the Judges.)

The Court was then opened by the crier, and the following orders were read: —

COMMONWEALTH OF MASSACHUSETTS.

At the Supreme Judicial Court of the Commonwealth, begun and holden at Boston, in and for said Commonwealth, on the second day of July, in the year of our Lord one thousand eight hundred and fifty-nine.

By the Hon. LEMUEL SHAW, Chief Justice.

Hon. CHARLES A. DEWEY,
Hon. THERON METCALF,
Hon. GEORGE T. BIGELOW,
Hon. PLINY MERRICK,
Hon. EBENEZER R. HOAR,
} Justices.

It is *Ordered*, That rules shall be held in the clerk's office in all the counties in the Commonwealth, on the first Monday of every month in each year, unless the same shall happen on a holiday; at which all proceedings may be had, which, by the established rules and orders, may be had at a rule day.

Ordered, That it shall be the duty of one of the justices of this court to attend at the Court House in Boston, on Saturday of each week, during the months of July and August, and on the three first Saturdays in September, at 10 o'clock A. M., for the purpose of hearing matters in equity cognizable by a single justice; and the several justices are designated as follows: —

Hoar, J. — July 9 and 16.
Bigelow, J. — July 23 and 30.
Shaw, C. J. — August 6 and 13.
Hoar, J. — August 20 and 27.
Metcalf, J. — September 17.

And in the absence of either of the justices named as aforesaid, some other justice of the court shall attend in his place, and shall be designated for that service.

Ordered, That in all real actions, including suits to foreclose mortgages, pending in the Supreme Judicial Court in any county at the time the act entitled "An act establishing the Superior Court," took effect, if either the demandant or the tenant, or any person in their behalf, shall, on or before the first day of August next, make and file with the clerk of said court in such county, an affidavit stating that he verily believes that the estate sought to be recovered, together with the rents and profits recoverable on the same suit, exceed in value, if in Suffolk county, four thousand dollars, the same shall be retained in the Supreme Judicial Court, and entered in its docket, to be proceeded in at the next jury term for the same county, as established by said act; but all other real actions shall be transferred to and entered at the next Superior Court of said county for civil business.

By the court, GEORGE C. WILDE, *Clerk*.

The court was then adjourned till Tuesday, the 6th day of September next, at 10 o'clock A. M.

The following Circular has been addressed to the several clerks of the counties by the Supreme Judicial Court:—

BOSTON, 23d June, 1859.

To the Clerks of the several Counties of the Commonwealth:

GENTLEMEN:—As the act of the last session of the Legislature, entitled "An Act establishing the Superior Court," will come into operation from and after the first day of the ensuing month of July; and as the act makes some important changes in the organization and terms of the courts, and of the actions and proceedings pending therein, the justices of the Supreme Judicial Court, having examined this act with some attention, and finding that important duties will devolve upon the clerks as soon as the act shall take effect, have thought it would be useful, and tend to promote uniformity in carrying the new system into effect, to express their views of what are the present duties of the respective clerks.

No doubt many questions will arise hereafter upon the legal construction of this act, which will demand the attention of the Court when presented, and if any construction of its terms, which we now adopt, should be drawn in question, in cases in which the rights of parties may be affected, we shall consider it open to consideration. We would, therefore, rather avoid expressing any opinions, in advance, on the effect and meaning of questionable provisions of the act, further than it is necessary to do so, in order to carry it into operation, according to the true and legal intent of the Legislature.

We consider that, as the last section of the act makes it take full effect from and after the first day of July, it goes into operation on the second day of July, and that all acts and parts of acts repealed by it, cease to operate with the termination of the first day of July.

One of the first duties of the clerks will be to distribute and enter the actions and proceedings pending in the several courts, according to the directions of the act.

All actions and proceedings pending in the Court of Common Pleas, in any county, will be transferred to and entered on the docket of the Superior Court for the same county.

All actions and proceedings pending in the Superior Court for the county of Suffolk, as heretofore constituted, and in the Municipal Court for the city of Boston, shall be transferred to and entered in the Superior Court for the County of Suffolk, as constituted by this act.

Of the cases pending in the Supreme Judicial Court, in any county, when this act takes effect, all capital cases must be transferred to and entered on the docket of the Superior Court of such county.

All law cases, including all cases in law or in equity, and all other proceedings, now by law requiring the action of the full Court in either county, except criminal cases, shall remain on the law docket of such county.

All cases pending in the Supreme Judicial Court, other than law cases, in which the debt or damage, or the value of the property, real or personal, claimed, does not exceed, if in Suffolk county, four thousand dollars, or in any other county, one thousand dollars, shall be transferred to and have day in the proper term of the Superior Court in the respective counties; which we understand to be the then next term of said Superior Court, as established by the said act.

In counties where civil and criminal terms are directed to be held, civil cases shall be transferred to the next term for civil business, and criminal cases to that for criminal business.

All other cases pending in the Supreme Judicial Court, will be retained on the docket of that court for the same county, and carried forward to the next succeeding jury term, as prescribed by this act.

In determining the actions which are to be retained in the Supreme Judicial Court for trial, and those to be transferred, in which the value of the property sought to be recovered is the test, the following rules will be observed:—

1. In all actions in which money is the subject of the suit, that is, where debt or damage is sought to be recovered, the *ad damnum* in the writ shall govern.

2. In appeals, in which claims of creditors of estates of insolvents, living or deceased, are sought to be established, the amount claimed will govern.

3. In replevin, the appraised value of the property replevied, or the agreed value, as ascertained by law, shall govern.

4. In real actions, including suits to foreclose mortgages, if either the demandant or the tenant, or any person in their behalf, shall, on or before the first day of August next, make and file with the clerk an affidavit, stating that he or she verily believes that the estate sought to be recovered, together with the rents and profits recoverable in the same suit, exceeds in value, if in Suffolk, four thousand dollars, in other counties, one thousand dollars, the same shall be retained in the Supreme Judicial Court, and entered on its docket, to be proceeded in at the next jury term, for the same county, as established by said act—all other cases to be transferred to and entered at the next Superior Court of said county for civil actions.

The next important question is, What will be the duties of clerks after the act goes into operation?

By this act it is provided that a law term of the Supreme Judicial Court shall be held at Boston, on the first Wednesday of January, in each year, which term may be adjourned from time to time, to such places and times as may be most conducive to the despatch of business and the interests of the public.

The court thus directed to be held, is in other parts of the act designated as the Supreme Judicial Court for the Commonwealth, for which a separate clerk is provided, and which is to have different functions, and adopt a different course of proceeding from those of law-terms heretofore usually held in counties, for one or several counties. In one respect, it is properly described and called the Supreme Judicial Court for the Commonwealth, inasmuch as it is provided that all exceptions and appeals from the Superior Court to the Supreme Judicial Court in every county, in criminal cases, and in some other cases specified, are to be carried directly to the Supreme Judicial Court, thus to be held in Boston.

Another peculiarity of this court is, that although one term thereof is expressly directed by law to be held the first Wednesday of each year, it is manifestly contemplated by the act that it shall be continued from time to time during the whole year; and another peculiarity, necessarily incident thereto, is, that matters cognizable by that court as a law court, such as exceptions and appeals from the Superior Court in all the counties of the State, except the five western counties, and all appeals and exceptions, and law cases carried up from the jury terms of the Supreme Judicial Court as law cases, except said five western counties, will be carried directly to the law court thus to be held at Boston, at any time, and entered on its dockets, at the office of the clerk of the Supreme Judicial Court of the Commonwealth, to be proceeded in as the law requires.

But it is further provided by this act that law terms of the Supreme Judicial Court shall annually be held as follows, viz.:—

At Lenox, in and for the county of Berkshire, on the second Tuesday of September.

At Northampton, for Hampshire and Franklin, on the Monday next after the second Tuesday of September.

At Springfield, in and for the county of Hampshire, on the fourth Monday of September.

At Worcester, in and for the county of Worcester, on the first Monday of October.

Our view of these provisions of the Statute is, that the term of the Supreme Judicial Court, directed to be held at Boston in January, and by necessary implication, required to be kept open the whole of the year for the entry of cases, is, to many purposes, the Supreme Judicial Court of the Commonwealth; and is especially a law court for the nine counties, other than the five above mentioned; and is the court of the Commonwealth, thus designated in other parts of the act.

With this view of the provisions of this law, the justices are of opinion that in all cases, on and after the second day of July, all exceptions and appeals in criminal cases arising in the Superior Court, in any county of the Commonwealth, and in all cases in the Supreme Judicial Court, or Superior Court, sitting in either of the said five western counties, in which the parties agree in writing, or in which the presiding justice shall think that a more speedy decision is required, or can be obtained, and may order the questions of law to be entered and heard in Boston, as provided by section thirty-six, it will be the duty of the respective clerks of the courts in which they arise, within fifteen days after the final adjournment of said court, to cause copies of such cases, as required

by the act, to be transmitted to and entered in the Supreme Judicial Court for the Commonwealth, at Boston.

All questions of law, whether existing upon appeal, exception, or otherwise, from either the Supreme Judicial Court or Superior Court, held in and for each county, shall, within fifteen days after the final adjournment of such court, be transferred to and entered in said Supreme Judicial Court for the Commonwealth, thus held at Boston, to be therein determined, if the same shall arise in the county of Essex, Suffolk, Middlesex, Norfolk, Plymouth, Bristol, Barnstable, Dukes county, or Nantucket.

If questions arise, either in the Supreme Judicial Court or the Superior Court, in the county of Berkshire (other than above directed to be sent to the law court at Boston), they shall be entered at the law term in Lenox, as above mentioned.

If in Hampshire or Franklin, at the law term at Northampton.

If in Hampden, at the law term at Springfield.

If in the county of Worcester, at the law term at Worcester, to be proceeded in and determined by the full court.

And it shall be the duty of the clerks of the several courts in said five counties, to enter cases and prepare copies of all law cases cognizable by the Supreme Judicial Court at such law terms, and act therein as clerks of this court, in and for their respective counties.

In order to comply with what is understood to be the spirit of the act, and to facilitate the public business of the courts, during the residue of the present year, the justices propose, by special order, pursuant to an authority vested in them, for that purpose by the act, to hold a special term of the Supreme Judicial Court of the Commonwealth, at the court-house in Boston, on Saturday, the second day of July next; after which all entries may be made in the office of the clerk of said court, in the manner and according to the course hereinbefore directed.

And as it is provided by the act that the clerk of the Supreme Judicial Court for the county of Suffolk, shall act as clerk of the said court for the Commonwealth, until his successor is appointed and qualified; and as George C. Wilde, Esq., is Clerk of the Supreme Judicial Court for the county of Suffolk, he will act as such clerk, until the appointment of a clerk; of which due notice will be given.

On and after the second day of July, therefore, Mr. Wilde will have an office in readiness to receive all entries and copies proper therein to be entered, and generally perform the duties of clerk of the Supreme Judicial Court for the Commonwealth.

We consider that all processes issued in cases of libels for divorce are to be returned to, and other proceedings for divorce to be commenced in the Supreme Judicial Court, at a term thereof to be held by law in each county, in the county which by law has jurisdiction of such cases; and are not to be entered, in the first instance, in the Court of the Commonwealth, to be held at Boston, except to obtain an order of notice, returnable in the proper county. Probate appeals also are to be first entered at the terms of the Supreme Judicial Court, to be held by one justice in each county, there to be proceeded in according to law.

It may be proper to add, that in the act under consideration, and also in another act, passed at the same session, Statute 1859, chapter 137, being an act to regulate proceedings in equity, some rules are laid down, which it may be convenient for clerks and suitors to understand. All cases in equity are to be commenced, as heretofore, in the Supreme Judicial Court for the county having proper jurisdiction thereof, by bill or petition filed in the office of the clerk of the Supreme Judicial Court for such county, at a term thereof, or at some rule-day. The court, when organized, will pass an order directing that a rule-day shall be held at the clerk's office in each county on the first Monday of every month, unless the same happen

on a holiday, and then on the next succeeding day, not a holiday, at which proceedings may be had, which by the established rules and orders may be had at a rule-day.

For the justices of the Supreme Judicial Court.

LEMUEL SHAW, *Chief Justice.*

At a meeting of the Justices of the Superior Court, held at Boston, in the County of Suffolk, on the second day of July, in the year 1859, present: —

The Hon. CHARLES ALLEN, Chief Justice.
Hon. JULIUS ROCKWELL,
Hon. OTIS P. LORD,
Hon. MARCUS MORTON, Jr.,
Hon. EZRA WILKINSON,
Hon. HENRY VOSE,
Hon. SETH AMES,
Hon. THOMAS RUSSELL,
Hon. JOHN PHELPS PUTNAM,
Hon. LINCOLN F. BRIGHAM,
} Justices.

Ordered, That in all trials of causes, whether by jury or by the court, the closing arguments of the counsel of the respective parties shall be limited to one hour on each side; unless before the commencement of the argument, for good cause, the court shall allow further time.

Ordered, That witnesses, during their examination, shall be interrogated by one counsel only on each side, who shall respectively conduct the examination and cross-examination standing.

Ordered, That the clerk of said court for the County of Suffolk be, and he hereby is, directed to furnish attested copies of these orders to the several clerks of the said court in the other counties.

SUFFOLK, *ss.* — THE SUPERIOR COURT, July 2, 1859.

By the Court, JOSEPH WILLARD, *Clerk.*

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commenceme't of Proceedings.	Name of Judge.
		1859.	Returned by
Bowley, Samuel C.	Blackstone,	May 26,	Henry Chapin.
Cox, Samuel W.	Malden,	" 11,	Wm. A. Richardson.
Crowell, Hiram,	Edgartown,	" 30,	Theo. G. Mayhew,
Devine, Patrick (1)	Lowell,	" 12,	Wm. A. Richardson.
Farnham, Charles W.	Lawrence,	" 31,	George F. Choate.
Harwood, David S.	Lowell,	" 4,	Wm. A. Richardson.
Healey, Samuel (2)	Southbridge,	" 31,	Henry Chapin.
Henshaw, Dexter	Fitchburg,	" 24,	" "
Horton, William	Boston,	" 25,	Isaac Ames.
Howe, John jr.	"	" 19,	" "
Hutchinson, Wm. H.	Middleton,	" 27,	George F. Choate.
Johnston, John	Fall River,	" 27,	Edmund H. Bennet.
Kenerson, Wm. W.	Boston,	" 9,	Isaac Ames.
Knowles, Josiah S.	Orleans,	" 3,	J. M. Day.
Mack, Wm.	Boston,	" 12,	Isaac Ames.
Parker, Jerry B.	"	" 25,	" "
Rawson, Joseph D. (3)	Worcester,	" 30,	Henry Chapin.
Riley, John	Lawrence,	" 14,	George F. Choate.
Rood, Daniel	New Marlboro'	June 6,	James T. Robinson.
Sanford, Daniel H. } (4) Sanford, Hugh S. }	Pittsfield,	May 12,	" " "
Simons, Sanborn G.	Chelsea,	" 19,	Isaac Ames.
Southwick, David (3)	Worcester,	" 30,	Henry Chapin.
Taft, Silas S. (2)	North Oxford,	" 31,	" "
Tobin, Patrick J. (1)	Lowell,	" 12,	Wm. A. Richardson.
Welchlin, Frederick,	Boston,	" 12,	Isaac Ames.
Wilson, Thomas	"	" 2,	" "

FIRMS.

(1) Tobin & Devine.
(2) Not stated.
(3) Not stated.
(4) Sanford & Brother.